Supreme Court, U.S.
FILED

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No.

In the
Supreme Court of the United States

GARY H. PALM,

Petitioner,

v.

RODERICK R. PAIGE, SECRETARY OF EDUCATION,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The District of Columbia

PETITION FOR A WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

1. Whether the initial complaint need only allege an injury caused by the government defendant's actions to establish Article III standing at the pleading stage or whether the initial complaint must contain allegations that establish every element of Article III standing that must be proved at trial.

2. Whether allegations that the Department of Education ordered the ABA to eliminate the House of Delegates from making any accreditation decisions is sufficient to show causation at the pleading stage or whether a third party's (ABA) compliance with the Government Defendant's orders precludes Article III standing at the pleading stage.

3. Whether de novo review of dismissal of a complaint for lack of standing must consider all subsidiary facts that can be imagined to be included within the facts alleged.

4. Whether a member of a not-for-profit corporation has standing to obtain a declaratory judgment that the Government's orders are invalid when the corporation refuses to challenge these orders and Petitioner has tried to challenge them in other proceedings.

5. Whether Petitioner who has alleged dilution of his vote as an ABA member by the Government's actions must show that reinstating his voting strength would actually result in actions favorable to his interests or is it enough that there be a significant vote dilution caused by the Government's action that is being challenged.

6. Whether the Circuit Court of Appeals' triage system that allows a Staff Lawyer to decide to treat a case as one likely for disposition without oral argument and relies on a draft of the final order prepared by a staff lawyer before the first brief is due to be filed is unconstitutional and violates the accepted and usual course of proceedings.

7. Whether the Circuit Court of Appeals and the District Court departed from the accepted and usual course of judicial proceedings by not allowing Plaintiff to file even one amended complaint when it used a strict evidentiary standard to evaluate the allegations of the complaint with respect to Article III Standing.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia.

OPINIONS AND ORDERS BELOW

The Court of Appeals issued its Judgment on August 9, 2002 (App.1) and its per curiam Order upon denial of the Petition for Rehearing and Rehearing En Banc on November 7, 2002. (App. 3)

The District Court issued its Memorandum Opinion on September 4, 2001 dismissing the Complaint with Prejudice, *Palm v. Paige*, 161 F. Supp. 2d 26, 2001 U.S. Dist. LEXIS (2001). (App. 4)

The District Court also entered orders dated October 30, 2001 and November 20, 2001 denying Plaintiff's Motion for Reconsideration of Order Dismissing Complaint with Prejudice and denying Plaintiff's Motion for Leave to file First Amended Complaint. (Appendix)

JURISDICTION

(1) The Court of Appeals Judgment was entered on August 9, 2002.

(2) The Petition for Rehearing and Rehearing En Banc was denied on November 7, 2002.

(3) Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The following Constitutional and Statutory Provisions are set out in the separate Appendix.

Federal Rules of Civil Procedure

a. Rule 8
b. Rule 9
c. Rule 15
d. Rule 58

Higher Education Act, 20 U.S.C. § 1099b

Department of Education Regulations relating to Accrediting Bodies, 34 CFR 602

STATEMENT OF THE CASE

The Circuit Court for the District of Columbia affirmed the dismissal of Petitioner's complaint on the grounds that his complaint did not allege the elements of proof required to show Article III Standing. Petitioner's complaint had challenged the legality of the Department of Education regulations as applied to the American Bar Association. Jurisdiction was asserted under 28 U.S.C. § 1331.

I. FACTUAL BACKGROUND

The Highest Courts of all fifty states use the American Bar Association as the accreditation authority for graduates of American law schools to sit for the bar. Since at least 1952 until the action of the Department of Education complained of in this case, the House of Delegates was the final decision maker on the accreditation of schools and determining accreditation standards. It acted upon recommendations of the Council of the Section of Legal Education and Admissions to the Bar. In the 1970's and 1980's criticism grew in many quarters that the ABA was no longer in control and that the influence of the deans and professors over the Council had reached the level of effective control and was being exercised unfairly and without regard to educational validity and reliability. New law schools were being held to higher standards to keep out competition. Others were concerned that there seemed to be discrimination against religiously affiliated schools and schools that use non-traditional teaching methods like clinical education or were teaching centered rather than research-oriented.

A. DOJ Filed An Anti-Trust Complaint Alleging That The Academics And Deans Of Regulated Schools Had "Captured" The Accreditation Process

In the early 1990's, the Justice Department investigated and concluded that a "guild" of law school deans and academics had "captured" actual control of the ABA's accreditation system in violation of the anti-trust laws. (labels used by DOJ). The complaint alleged that the ABA had fixed law school faculty salaries and had tried to suppress competition from law schools that were not approved by the ABA. Competitive Impact Statement, *USA v. ABA,* 60 Fed. Reg. 39421 (1995).

The Department of Justice's Anti-Trust Division in its competitive impact statement filed with the Consent Decree found that the Council had committed Anti-trust violations. The antitrust case against the ABA has been summarized well as follows:

> "The government's case alleged that the law school accreditation process had been captured by legal educators and that the ABA, under these educators influence, formulated and enforced anticompetitive standards and engaged in a group boycott of schools failing to achieve those standards. The case was eventually terminated with a consent decree in which the ABA agreed to discontinue a few of the challenged practices and alter the composition of the committees and organizations that control the accreditation process in order to reduce the legal educators' role in the process." Marina Lao, Discrediting Accreditation: Antitrust and Legal Education, 79 Wash. U. L.Q. 1035, 1043-44. (2001).

The Anti-Trust Division concluded that the "capture" was accomplished through the use of the Discounted Group Membership Program open only to accredited schools to pay for all their faculty and administrators to join the Section and elect the members of the Council. Thereby, the accredited schools and their large contingent of academic faculty control nearly 90% of the voting members of the Section. DOJ found that the result was a

conspiracy to raise law faculty salaries through the accreditation process, among other conclusions.

Final decision making authority of the House of Delegates on accreditation and oversight supervision of the Council and the Legal Education Section was expanded as part of the Decree. Complaint ¶13. (Appendix)

B. The Department of Education Approved The Consent Decree Before It Was Entered.

Prior to entry of the Consent Decree, the Department of Education informed the parties, the trial judge and the public that the Consent Decree did not violate its regulations. Complaint ¶13. (Appendix) Specifically DOE informed the Court in writing that the role of the House of Delegates set out in the Consent Decree was in compliance with DOE's "separate and independent" regulations, the regulations at issue here. Complaint ¶14. (Appendix)

C. The Department of Education "Discovers" After 45 Years Of Regulation That The House of Delegates Makes The Final Accreditation Decisions.

Some time later, without advising the Court, the Department of Education changed its opinion and concluded to the surprise and amazement of many that the Consent Decree violated its "separate and independent" regulations. DOE employees claimed that they now realized for the first time in all the years of reviewing the ABA since the 1950's, that the House of Delegates was the final decision making authority. Complaint ¶15. (Appendix)

The Department of Education succeeded in imposing its will to maintain faculty control of accreditation over the Department of Justice. The ABA, DOE and DOJ acted to diminish the role of the House of Delegates without first obtaining the court's approval or even informing the Court that their actions were in were in violation of the Consent Decree.

The Department of Justice in its brief before Judge Lamberth depicts the situation as follows in response to Petitioner Palm's

comments opposing the modification of the Consent Decree: "the comments also contended the proposed modification of the Consent Decree reflects a change in the Department of Education interpretation of the 'separate and independent' requirement. They claim that the Department of Education has originally been of the view the decision-making role of the House of Delegates did not violate the 'separate and independent' requirement. As the Department of Education has explained, however, it was not until the Secretary reviewed the ABA in 1997-2000 that the Department of Education identified the problem with the ABA's compliance." DOJ stated earlier in its briefs that "the Department of Education did not understand, when it originally reviewed the Decree, that Section 6(a) required the House of Delegates to review and approve standards, interpretations and rules. The Department of Education did not, at that time, object to Section VI(a) of the final judgment which requires the ABA to subject interpretations and rules 'to the same public comment and review process and approval procedures that apply to proposed standards.' The parties intended this to mean that the House of Delegates would approve interpretations and rules as it had done for standards for many years. The Department of Education did not realize that this was the intent of Section IV(a)." See U.S. Memorandum in support of modification at 4-5. (emphasis added)

DOE then reinterpreted its regulations' requirement of "separate and independent" status so that the House of Delegates could no longer play its long-standing determinative role in accreditation matters. Complaint ¶17. DOE's action coincided with concerns by deans of many of the accredited law schools about the increased involvement of the re-energized House of Delegates including its reversal of Council recommendations. The ABA registered its official disagreement but meekly complied and did not even file an administrative appeal within DOE or seek judicial relief.

Relying on the extreme judicial deference accorded the Department of Justice in anti-trust consent decree matters, Judge Lamberth approved the Department of Justice's and ABA's jointly sought modification of the Consent Decree and refused to address Plaintiff's non-party arguments that the DOE's regulations are invalid. The District Court explained its limited role: But even if the arguments of Palm and other Commenters were much more

persuasive, the Court would not be bound to accept them. Rather, it is much the opposite. The Court is "bound to accept any modification that the [Antitrust Division] . . . reasonably regard[s] as advancing the public interest." *Western Elec. Co., 993 F.2d at 1576. United States v. American Bar Association*, 135 F. Supp.2d 28 (D.C. dist. 2001).

Then shortly after the modification, Petitioner filed this case in 2001.

D. Plaintiff Has Personally Raised Issues Seeking To Keep And Expand the House of Delegates' Role Before DOE, DOJ And In The Consent Decree Proceeding. DOJ Argued That Plaintiff Could Bring A Separate Action Challenging The Validity of the Regulations.

The Department of Justice in its brief in support of the modification of the Consent Decree and in response to the comments submitted by Petitioner Palm (then "Commenter Palm") argued that the anti-trust Consent Decree modification proceeding is not a proper place to address "the challenge to the propriety of the Department of Education regulations." The Department of Justice stated that the regulations may be challenge in a proceeding brought under the Administrative Procedure Act.

In the anti-trust action, when the Consent Decree was originally proposed, Plaintiff filed objections to the Consent Decree under the Tunney Act. At that time, Professor Palm was on the Council of the ABA and had come to believe that what was being done on the Council was improper and illegal and that the problem was in the "capture." Ultimately, Plaintiff along with Professor Robert Dinerstein of American University Law School met with the Department of Justice attorneys in an effort to understand more about how the Consent Decree was going to be enforced and both agreed to withdraw their objections. Plaintiff also relied on DOE's statements to the late Judge Richey as the basis of his objection to the Consent Decree.

Later Plaintiff spoke with DOE's Counsel for accreditation, Sally Wanner twice, and she assured him that House of Delegates' final

action on accreditation matters was not barred by the Higher Education Act or DOE's "separate and independent" regulations.

Thereafter, DOE staff had their sudden, belated realizations and abruptly changed their position on ABA governance. The Department of Education took the position that Petitioner was only entitled to make comments in the hearings on the ABA's continued recognition but that he would not be allowed to appeal the granting of the ABA's application through the ranks of the DOE as is provided for parties. As stated earlier, the ABA leadership did not appeal and acquiesced in the change in governance.

PROCEEDINGS IN THE DISTRICT COURT

Plaintiff filed his Complaint seeking a declaratory judgment that the Department of Education's regulations and interpretations requiring that the ABA have a "separate and independent" entity to conduct accreditation of law schools are invalid because they conflict with The Higher Education Act's "Grandfathering" provisions for pre-1991 accrediting bodies, like the ABA; and conflict with the statutory authorization for trade associations to be accrediting bodies; and exceeds the limited authority granted to DOE to regulate accreditation only for purposes of federal programs and not for other non-federal purposes.

The Secretary moved to dismiss for lack of standing. The district court granted the motion, concluding that the allegations in Plaintiff's complaint did not show injury in fact, causation, or redressability—the three elements of Article III standing that must be shown at trial. *Palm v. Paige*, The court noted that Petitioner had alleged only generalized grievances, such as his "general dissatisfaction with the validity of the regulations, their inconsistency with the [Higher Education Act], the Secretary's authority to impose their requirements and the manner in which the ABA adopted the changes to their accreditation process." *Ibid.* To the extent Palm alleged an injury to the ABA, the court determined that Palm lacked standing to assert an institutional injury on that organization's behalf. The court also held that Petitioner could not satisfy the causation requirement, because "the Council's substantive decisions on matters of accreditation do not flow from the Secretary's requirement that the Council be separate and

independent from the ABA." Finally, the court determined that the antitrust consent decree, which prevented the ABA from changing its accreditation procedure, meant that Palm's alleged injuries would not be redressed by a favorable decision. The court entered an order dismissing the complaint with prejudice but not dismissing the action.

Plaintiff filed a motion to reconsider the dismissal and for leave to file his First Amended Complaint. Judge Huvelle proceeded precipitously and denied the motion before Plaintiff's reply brief was even due to be filed. Plaintiff filed a motion to vacate the granting of the motion to reconsider. Judge Huvelle recognized that the earlier dismissal order was invalid because no separate judgment was filed as required by Federal Rule of Civil Procedure 58. Order of October 30, 2001. (Appendix) She also recognized that she had acted prematurely and allowed Plaintiff to file his reply brief in support of his motion to reconsider.

Since no judgment had been entered, Plaintiff sent to the Clerk his Amended Complaint As Of Right. But Judge Huvelle sua sponte refused to allow the Clerk of the District Court to file this Amended Complaint. Judge Huvelle denied Plaintiff's motion to reconsider and entered a new final order dismissing the case together with a separate judgment indicating again that the "Complaint was Dismissed with Prejudice," but added "This is a final appealable order."

Petitioner then filed his Notice of Appeal.

COURT OF APPEALS PROCEEDINGS

Shortly after the Notice of Appeal was filed, the Staff Attorney and the Clerk's Office designated this case for disposition without oral argument. The Staff Attorney and the Clerk's Office then set a schedule for briefs and indicated the recommendation of no oral argument by designation of "Oral Argument Not Yet Scheduled." Petitioner had no way to know this legend meant that the case was being assigned to a special panel that hears all cases designated for disposition without oral argument.

The Court affirmed and ruled that Plaintiff had to allege the three elements of Article III Standing required at trial. The Court also ruled that the District Court did not abuse its discretion in denying Plaintiff leave to file even one amended complaint. The Court did recognize that some of Plaintiff's interests would qualify as injuries in fact but claimed Plaintiff did not raise them below. Plaintiff had explicitly raised them below in his brief in Opposition to the Motion to Dismiss. The Court refused to consider these interests de novo or remand to allow Petitioner to file an amended complaint. The Court also ruled that Plaintiff lacked standing because the ABA's compliance with DOE's orders were independent actions of a third party not before the court and therefor, the chain of causation was broken and not established in the complaint. Petitioner's request for remand to amend his complaint to a derivative action on behalf of the ABA and/or to join the ABA as a party defendant was apparently denied although the Court did not address this request.

Petitioner then filed his Petition for Rehearing and Rehearing En Banc which argued that the Court misunderstood Petitioner's arguments about standing. Petitioner also raised his arguments that the process for disposition without oral argument, as set forth herein that makes important decisions before the Appellant is even scheduled to file a brief. The Court denied the Petition but filed a short statement indicating that the Judges on the Special Panel voted unanimously to deny oral argument but did not contest Petitioner's assertions about how the Staff Lawyer system works.

Petitioner found it difficult to determine how his case was processed because the Clerk's Office refused to provide more details about the system than those contained in the *Handbook of Practices and Internal Procedures*. The docket does not disclose the actions of the Staff Lawyer and the Special Panel. The Clerk's Office refused to disclose a copy of the contents of the Staff Lawyer's proposed disposition and draft final order.

ARGUMENT

I. THE COURT OF APPEALS' DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND THOSE OF OTHER CIRCUITS ON THE

IMPORTANT QUESTION OF THE PLEADING STANDARD TO ALLEGE ARTICLE III STANDING.

This case presents questions about what is sufficient at the pleading stage to show Article III Standing. The Petition for Certiorari should be granted to decide that this Court's decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed.2d, (Feb. 26, 2002) applies to Standing as well as employment discrimination claims. This Court's ruling in *Swierkiewicz* was that allegations of the elements of a prima facie case were not necessary in the complaint alleging a Title VII violation under federal notice pleading. The District Court's dismissal of the complaint was made before this Court decided *Swierkiewicz*. The District Judge ruled that Plaintiff must allege each element of Article III Standing with the specificity and certainty that would be required at trial or on summary judgment. The Circuit Court agreed that "[E]ven at the pleading stage, the allegations of the Complaint must meet the requirements for standing." Judgment p. 1, Appendix. This ruling directly conflicts with this Court's recent unanimous decision in *Swierkiewicz* as well as a line of other rulings by this Court.

The Circuit Court conflicts with the holding of *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) that "general allegations resulting from the defendant's conduct" are sufficient. 561 *Lujan* distinguished between plaintiff's burdens in the complaint and at the later stages of summary judgment and trial.

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial."

Lujan v. Defenders of Wildlife, 504 U.S. 555 at 561 (1992). Plaintiff's allegations show injury and causation because DOE used the challenged regulations to force the ABA to eliminate the House of Delegates as the decision-maker in accreditation matters.

The decision is also in conflict with *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) where Justice Scalia concluded that specificity of the type that is required at summary judgment to show standing is not required in the complaint. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court restated the limited pleading required in the complaint: "*Lujan*, since it involved the establishment of injury in fact at the summary judgment stage, required specific facts to be adduced by sworn testimony; had the same [standing] challenge to a generalized allegation of injury in fact been made at the pleading stage, it would have been unsuccessful." (emphasis added)

The net effect of the Circuit Court's misinterpretation of *Lujan* is to create a heightened pleading standard, one that conflicts with the regime of notice pleading established by the Federal Rules of Civil Procedure and recently rejected in *Swierkiewicz*. Such heightened pleading requirements should have been foreclosed since 1993 by *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

The Court of Appeals' decision also conflicts with many of this Court's cases that hold that a Rule 12(b) motion to dismiss "presumes that general allegations embrace those specific facts that are necessary to support the claim." In his recent unanimous Supreme Court opinion, Justice Thomas reiterated the Court's position that Federal Rule of Civil Procedure 8(a) only requires general factual statements that can fairly be read to include more specific facts. *Swierkiewicz v. Sorema N.A.*, 2002 LEXIS 1734, 70 U.S.L.W. 4152 (February 26, 2002). He recognized again that the Federal Rules anticipate that discovery will unearth relevant facts and evidence and that "simplified notice pleadings relies upon liberal discovery rules and summary judgment motions to define disputed facts and issues to dispose of unmeritorious claims" *Id* at 12. This judicial expenditure of resources at the complaint stage is wasteful and unfair to Plaintiff who has not yet had the benefit of discovery to develop his proof of "causation" and "redressability."

This Court should decide this case to make clear that *Swierkiewicz* applies to standing and that allegations of injury and a causal link are sufficient at the motion to dismiss stage to show standing. Summary action by this Court to reverse and remand for reconsideration in light of *Swierkiewicz* would be an appropriate alternative in this case.[1]

A. The Decision Below Conflicts With Decisions Of The Seventh, Eighth Ninth and Tenth Circuits. The Third Circuit Agrees With The D.C. Circuit. The Second Circuit Agreed With The D.C. Circuit In Part And Disagreed In Part.

The Court of Appeals' Judgment conflicts with other circuits which have recognized the distinction between the requirements for proof of summary judgment and allegations of injury in the complaint to show standing. In the Seventh Circuit's *South Austin Community Council v. SBC Communications Inc.*, 274 F.3d 1168 (7th Cir. 2001), Judge Easterbrook's opinion reminded the district court that preemptive screening upon motions to dismiss in terms of their specificity "has nothing to do with standing." He continued, "Complaints need not be elaborate, and in this respect injury (and thus standing) is no different from any other matter that may be alleged generally." At 1170. Rather than screen complaints in light of their likelihood of success on the merits, courts must, upon motions to dismiss, "follow the norm that a complaint is sufficient if any state of the world consistent with the complaint *could* support relief." At 1171 (emphasis in original). Or, as Judge Easterbrook explained in a recent case, so long as it is possible to "imagine facts consistent with [the] complaint . . . that

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[1] As late as October 21, 2002, this Court granted certiorari and remanded a case to the First Circuit for reconsideration in light of *Swierkiewicz*. *Rucker v. Potter*, _____ U.S. _____ 123, S.Ct. 465, 154 L. Fd.2d 327, 2002 U.S. LEXIS 7784 (Oct. 21, 2002). On June 17, 2002 certiorari was granted and a remand ordered to the Ninth Circuit for reconsideration in light of *Swierkiewicz*. *O'Connor v. Northshore International Insurance Services, Inc.*, _____ U.S. _____, 122 S.Ct. 2584, 153 L. Ed.2d 774, 2002 U.S. LEXIS 4452 (June 17, 2002)

will allow Plaintiff standing, . . . no more is required." *Alliant Energy Corp. v. Bie*, 277 F.3d 916, 920 (7th Cir., 2002). (emphasis added)

After this Court's decision in *Swierkiewicz*, the Seventh Circuit has maintained its liberal interpretation of allegations of standing under *Swierkiewicz* to reverse dismissal of a complaint. *Payton v. County of Kane*, 308 F.3d 673 (7th Cir. 2002).

Moreover, the Judgment conflicts with a recent Tenth Circuit decision which relied on *Now v. Scheidler*, 510 U.S. 249, 256 holding that allegations of injury are sufficient to show standing at the pleading stage. *Robbins v. Wilkie*, 2002 U.S. App. LEXIS 17286 (10th Cir., August 21, 2002).

In *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002) the Ninth Circuit relied on *Swierkiewicz* to reverse a district court's dismissal for lack of sufficient allegations of concrete injury and proximate causation to show Article III Standing and standing for RICO claims. The Eighth Circuit in *Gardner v. First American Title Insurance Co.*, 293 F.3d 991 (8th Cir. 2002) reversed a dismissal of a complaint and held that *Swierkiewicz* applies to standing even if standing is part of jurisdiction that must be pleaded under Federal Rule of Civil Procedure 8(a)(2). This ruling is in direct conflict with the D.C. Circuit Court of Appeals ruling below.

On the other hand, in *Pryor v. National Collegiate Athletic Association*, 288 F.3d 548 (3rd Cir. 2002) the Third Circuit has recently agreed with the D.C. Circuit that allegations of injury are not sufficient but that "Constitutional standing requires pleadings that show . . . "the three elements of a legally recognized injury; causation and that a favorable decision will likely redress the injury. The Court refused to allow a more generous notice pleading standard even standing for a declaratory judgment to allow those in conflict to reorder actions in light to the Court's ultimate ruling on the merits. Here, a ruling that DOE's actions with respect to the ABA are invalid and illegal will allow many of the actors involved to reassess their position. Plaintiff will certainly take actions as a member of the ABA to have the House of Delegates take back its power.

The Second Circuit in *Taylor v. Vermont Department of Education*, 2002 U.S. App. LEXIS 26431 (2nd Cir. 2002) used *Swierkiewicz* to reverse a dismissal of one count on standing but undercut its notice pleading standard by affirming dismissal of several other counts for lack of standing.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH MANY OF THIS COURT'S DECISIONS ABOUT WHAT CONSTITUTES INJURIES IN FACT FOR ARTICLE III STANDING AND WHETHER IT IS SUFFICIENT THAT PLAINTIFF ALLEGE THAT HE HAS BEEN DENIED AN OPPORTUNITY BECAUSE OF THE GOVERNMENT'S ILLEGAL CONDUCT.

Petitioner's interests are similar to "aesthetic and economic interests" recognized by the Supreme Court for standing. Any member of the ABA has suffered direct injury sufficient for standing. Increasing financial liability for future anti-trust violations together with the interest of a member in maintaining the integrity of the Association are sufficient to create standing under Supreme Court cases. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 185-186 (2000) the test for standing was whether the individual person has in some way been injured directly by the pollution that was being attacked. The Court found "recreational, aesthetic and economic" interests sufficient. It was a sufficient showing that one Plaintiff would no longer use the waterway because of its being polluted and another Plaintiff stopped fishing there. Other Plaintiffs stopped picnicking, walking, and bird watching there because of their aesthetic concerns with the polluted environment. Likewise here, Plaintiff's interest in participating in the political process to reform legal education through accreditation has certainly waned in light of the change in the power structure and its adverse effect on his efforts.

The Circuit Court's decision is contrary to this Court's vote dilution cases in which this Court found sufficient injury in fact for purposes of standing. In the landmark reapportionment case, *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court held that

voters are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes. In *Clinton v. City of New York,* 524 U.S. 417 (1998), the census case, this Court ruled that "this expected intra-state vote dilution satisfied the injury in fact, causation and redressability requirements." But here Plaintiff's situation is not just similar to those who would lose one Seat, it is worse because all voting seats in the House of Delegates were lost with respect to voting on accreditation matters. This issue (accreditation) has been reapportioned out of the House of Delegates' purview by DOE action. This case is like an equal protection violation when the legislature gerrymanders a district to benefit their party. It is enough for standing for a voter to show the loss of voting power. It is not necessary for standing to show that one will win elections. All that needs to be shown is that one's vote has been diluted. It is sufficient to show that one group took power at the expense of another group. Here, DOE required that voting power be taken from ABA members who elect House of Delegates members and given to the regulated law schools' faculty and deans who, as group members of the Legal Education Section, elect the Council members. This is a gerrymandering case by Order of the Department of Education. Plaintiff is a member of the group that was disenfranchised and therefore has Article III Standing.

The Court of Appeals' decision conflicts with Supreme Court decisions that hold that adverse impact upon one's bargaining position is sufficient injury to show standing. *Clinton v. City of New York,* 524 U.S. 417 (1998). Here, Plaintiff and his allies may not succeed in their efforts to improve legal education through the House of Delegates. But successes had been achieved in the past both on the floor of the House of Delegates and through negotiating with the Council while accreditation matters were before the House or while the Council was developing positions to present to the House.

All of these considerations were raised in the Complaint and argued in the briefs and will be established at trial to show standing. Indeed, the very effort to return the House of Delegates to power after Plaintiff wins this case, may well result in bargaining for a broader governance role for those of the Bench and Bar not in the controlling "capture" group. The DOE's action

has resulted in a dilution of Plaintiff's and other ABA members votes in electing the House of Delegates to control the Council and the Section. As a result of DOE's actions, a "separate and independent" subdivision makes the decisions in the name of the ABA but without the usual control of the House of Delegates, the Board of Governors or the ABA President.

But the Court of Appeals concluded that Appellant's injuries were caused by independent action of a third party (the ABA) not before the court. This position is contrary to the meaning of independent action and the generous reading that should be given to complaints in alleging causation. Discovery may establish the content of the several closed and secret meetings held between ABA leaders and the top officials in the Clinton Administration at DOE and DOJ. In drawing such a conclusion, the Circuit Court does not address the allegations that DOE ordered the ABA to make the changes or that all accrediting power would be lost and the Secretary so stated in writing. DOE's actions were the precipitating cause of the ABA's changes. Had DOE not issued its order, the 45-year governance structure would have remained in place.

The failure of the ABA leadership to take even an administrative appeal within the Department of Education and not seek judicial review challenging the legality of the regulations suggests an understanding was reached between the ABA leadership and DOE to use the regulations as a pretext for returning control to the "captured" Council. This is especially likely because the ABA's outside counsel, Sidley & Austin, had advised the ABA that the regulations at issue were invalid. Yet the ABA did not challenge them vigorously or even advise the Court of their opinion during the modification proceeding. But this possible collusion must await discovery. The failure of the ABA or DOE or DOJ to even advise the Court before it made its changes to eliminate the House of Delegates indicates that secrecy and a fait accompli were part of the tactics. Instead the government and the ABA just violated the Decree until their conduct was challenged and they then DOJ and the ABA agreed to put the "sweetheart" governance position arrangement into the Consent Decree sought a modification of the Consent Decree. The Circuit Court's narrow construction of causation in this case forecloses a dissident minority from seeking

to eliminate illegal requirements imposed by the federal government that dilute the voting strength of the minority.

The Department of Education did indeed "cause" Appellant's injuries through its coercive actions when it ordered the ABA to eliminate the House of Delegates as the decision-maker in law school accreditation matters. The Court of Appeals' decision is contrary to *Bennett v. Spear*, 520 U.S. 154 (1997) which held that such regulatory coercion is sufficient to establish standing.

The Circuit Court's decision further requires that Petitioner guarantee that the ABA House of Delegates would retake its previous governance power for accreditation matters. But an ex ante guarantee of success violates this Court's cases and is not the correct standard for ascertaining the possibility of redress. Several of this Court's cases *Northeastern Fla. Chapter of the Associated General Contractors of America v. Jacksonville*, 508 U.S. 656 (1993); *Clinton v. City of New York*, 524 U.S. 417 (1998); *Baker v. Carr*, 369 U.S. 186 (1962); and *Regents of Univ. Cal. v. Bakke*, 438 U.S. 265 (1978) establish that absolute certainty of Plaintiff's eventual victory in restoring the ABA's accreditation procedures is not required to satisfy the element of redressability.

III. PLAINTIFF'S ALLEGATIONS SHOWED MANY DIFFERENT INDIVIDUAL AND PERSONAL INTERESTS THAT SHOULD BE SUFFICIENT INJURIES AT THE INITIAL COMPLAINT STAGE BEYOND THOSE OF JUST ANY MEMBER OF THE PUBLIC.

Petitioner has alleged many different interests that individually or when combined together establish standing. Petitioner suffered each of the following injuries within the allegations in the complaint and were argued below.

1) Plaintiff's vote as an ABA member has been diluted. The House of Delegates' role has been diminished. On the other hand, DOE's action increased the role of the Council elected by faculty and deans of the accredited schools so that the strength of the votes of Petitioner and other members of the bench and bar who elect House of Delegates has decreased.

2) As a political leader in the ABA, Plaintiff relied on DOE's prior position to help fashion and execute the strategy and tactics for presenting to the House of Delegates reforms of legal education and the accreditation process conducted in the name of the ABA.

3) Any ABA member may well face increased dues to pay attorneys fees and damages for future anti-trust violations committed by the Council;

4) The ABA members' interest in maintaining the integrity of checks on and oversight of the Council in the ABA's governance structure;

5) Plaintiff's professional concerns as a lawyer and law teacher in improving the legal profession and law school preparation of lawyers;

6) Plaintiff has shown his direct, personal interest in the ABA's accreditation process in the past and is currently presenting to the Council proposed improvements in accreditation standards.

7) Plaintiff has tried repeatedly to obtain a decision that the House of Delegates can retain its 45-year decision-making authority for accreditation. Repeatedly he was told that he must pursue his claims against DOE in court. Petitioner followed those repeated suggestions by Government employees.

8) Plaintiff withdrew his objection to the Consent Decree in reliance upon DOE's position expressed to the Court that the Consent Decree's House of Delegates' role complied with DOE's "separate and independent" requirements.

9) Plaintiff appeared at nearly all, if not all, of the DOE hearings held to determine whether the ABA's Council should continue to be recognized as an accrediting body and presented his objections about the dangers created by eliminating the House of Delegates' final decision-making role in light of the "capture" of the Council which led to the Consent Decree. But DOE advised him that he could not raise an appeal within DOE.

The prohibition at issue in this case is one on how the ABA governs itself and not on what activities it can engage in. Precisely because DOE's regulations diminish the power of an ABA member's vote and alters the balance of power, Petitioner has a direct interest in stopping dilution of his vote. The effect of DOE's actions has been that the House of Delegates now has less power than it formerly did. There is nothing "hypothetical" about that diminishment of power. Moreover, as apportionment cases clearly show, vote dilution is a concrete injury in fact, regardless of the conjectural issue of whether or not the affected voters would constitute a winning plurality.

Before he left the University of Chicago Law School, Petitioner had been a Professor there for thirty (30) years. He had served as a member of the Council and the Accreditation Committee and is still playing a vigorous and active role in accreditation matters, especially in efforts to expand clinical education to meet the student demand at law schools. Evidence will show beyond dispute that Petitioner has been one of a handful of clinical teachers who lead clinical teachers on accreditation issues. Indeed, DOE was forced by the truth of Plaintiff's extensive leadership in the ABA to begrudgingly acknowledge in its brief below that Plaintiff has had a much greater direct involvement than a member of the general public.

The invalid regulations under attack are aimed directly at minimizing the involvement of the practicing bar and judges through the House of Delegates in accreditation matters. DOE's "unexpected" reinterpretation of the facts and its regulations occurred after the Illinois State Bar Association, of which Petitioner is an active member, and other groups sought to reform the accreditation standards and the ABA's accreditation operations through the House of Delegates.

Plaintiff has a fiscal interest as an ABA member in preventing future expensive wrongdoing by the Council and its Accreditation Committee. As a member of the ABA, among Plaintiff's interests is a fiscal one-to avoid increased dues and cutbacks in membership services in order for the ABA to pay legal fees and judgments for the "separate and independent" Council. DOE's position prohibits each and every one of the governing bodies of the ABA, (the

House of Delegates, the Board of Governors and the President) from supervising the functioning of the Council. This situation gives the "captured" Council carte blanche to run amock. In turn, DOE's requirements have greatly increased the likelihood that the "capture" group will commit violations of anti-trust laws and provide improper and even illegal discriminatory treatment of new schools, non-academic faculty members and those who challenge the Council's rulings through appeal to in court. ABA members have a direct interest in avoiding future liability for judgments and attorneys fees for on-going and future anti-trust violations and violations of other laws.

The current corporate structure required by DOE is irrational because it puts the regulated schools directly in control of the regulatory process. This is far worse than the indirect process of special interest lobbying and the revolving door of retired regulators being hired by the regulated (which occurs with professional staff of the Section anyway). This situation is far worse because the regulated law schools use the ABA as a front so they can maintain the false appearance of outside regulation. But the accredited law schools and their academic faculty are actually making the decisions about the entry of new competitor schools and under what terms and conditions their own schools and competitor schools will operate. Petitioner is injured by the appearance, as well as the actual existence, of corruption, conflicts of interest and illegal conduct. Petitioner should be allowed to obtain correction of these injuries for his good, the good of other ABA members and the good of legal education.

IV. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER BECAUSE THE COURT OF APPEALS DECIDED NOT TO GIVE FULL REVIEW WTH ORAL ARGUMENT BEFORE THE FIRST BRIEF WAS EVEN DUE TO BE FILED.

The staff lawyer system used by the Court of Appeals for the District of Columbia violates Appellant's rights to a fair and equal appellate review under Due Process, Equal Protection, Article III and the Federal Rules of Appellate Procedure by prematurely deciding to assign the case to a "special" panel that decides cases designated for disposition without oral argument. That decision is

made before Appellant even files his opening brief. The Staff Lawyer also prepares a proposed final order for the Judges. This Court should consider whether the D.C. Circuit's internal procedures violate these rights.

As a legal aid lawyer for thirty (30) years, Petitioner has confronted governmental efforts to cut back on making decisions on the merits of each individual claim and efforts to triage justice. The effort is made in good faith but too often results in injustice for individuals who lose by application of a triage profile. One of those cases that Petitioner litigated was *Logan v. Zimmerman Brush Co.*, 433 U.S. 422 (1982). This Court held that termination of a cause of action is a deprivation of property that must meet the standards of due process. All nine justices found that decisions terminating cause of actions must allow the Plaintiff to present his arguments and evidence before a decision is made. It was unacceptable and arbitrary to use the expiration of processing time limits not caused by Plaintiff as a measure of the merits and was found to be unconstitutional. As legal services programs have been drastically underfunded, more and more litigants must proceed on a pro se basis. What they encounter is not a fair and equal process but a profiling and triage system that determines who gets the judicial ration of full and fair consideration by the decision-maker. It is ironic that even Petitioner falls victim to this unjust system. Pro se litigants, like Petitioner, are entitled to better than they now receive and this Court should grant certiorari to determine that making even a recommended decision before any briefs have been filed is wrong.

The Circuit Court has a special panel that hears all cases designated for possible decision without oral argument. This triage decision is made based only upon the district court's decision below and includes a proposed dispositional order prepared by the Staff Lawyer. The D.C. Circuit has set up its own system of selective review like the certiorari system used by this Court except it did so without Congress' authorization.

The criteria for disposition without oral argument are stated as follows:

Rule 34(j) Dispositions

> Among the factors the Court considers are: (1) whether the appeal is frivolous; (2) whether the dispositive issue has previously been authoritatively decided; and (3) whether the facts and legal arguments are adequately presented in the briefs and record so that oral argument would not significantly aid the decisional process. The decision to dispense with oral argument must be unanimously made by a three-judge panel. *Handbook of Practices and Internal Procedures* at 48.

How can these criteria be addressed by the Staff Lawyer before the briefs are filed. Even beginning the analysis before the necessary documents are due to be filed is a sick joke and irrational. This Court should make clear that all litigants are to be given equal consideration based upon their arguments and not before they are even scheduled to make their arguments. This Court would not make its decisions about certiorari based only upon a Notice of Appeal without allowing the filing of a Petition for a Writ of Certiorari. Failure to consider the Appellant's brief is unfair, leads to a bias in favor of affirmance and has insufficient relationship to the merits for appellate review of the lower court decision. The writing of the proposed order and assigning the case to a special panel for non-oral argument dispositions before the first brief is filed do not meet even the lowest rationality standards for deciding cases and conflicts with this Court's decision in *Logan v. Zimmerman Brush Co.*, 433 U.S. 422 (1982). This triaging may serve the interests of expediency but it does not serve the interests of justice with even the appearance of fairness.

The decision to decide this case without oral argument was made initially before any briefs were even filed. According to the D.C. Circuit's *Handbook Of Practice And Internal Procedures,* "[I]n civil cases, oral argument dates and panels are usually set before the briefs are filed . . . ." (emphasis in original) Section IV (A)(3). There is a special panel that considers and decides cases recommended for disposition without oral argument under Circuit Rule 34(j):

Section XI(c)(2).

> The Court's Case Management Plan is designed to identify early in the appellate process cases suitable for disposition without oral argument under Circuit Rule 34(j). When a staff attorney screens a new appeal and concludes that Rule 34(j) treatment may be appropriate, that screening recommendation goes to the Clerk's Office, and a briefing schedule (but no oral argument date) is set. The staff attorney then reviews the briefs, and if he or she concludes that the case should be disposed of without oral argument, the staff attorney recommends to the special panel that it decide the case on the merits, pursuant to the Rule. The staff attorney also proposes a disposition, embodied in a draft judgment and, where appropriate, an accompanying memorandum.

The D.C. Circuit's procedures for disposing of a high volume of appeals by dispensing with oral argument and relying on a recommended decision of a single staff lawyer is improper. It violates Due Process and Equal Protection (1) because this system classifies cases and prepares the dispositional order for cases that are decided without oral argument before the briefs are even filed; (2) invades the role of Congress in setting up additional judgeships and in creating a certiorari style case selection process; 3) delegates judicial duties to non-Article III judges if more judges are needed, Congress should act; (4) gives undue incentives to dispose of cases expediently rather than fairly; (5) provides for different classes of cases and is used more extensively to screen pro se cases than other cases; and (6) violates Due Process requirements by not providing the recommended decision to counsel for filing of exceptions, as is done for magistrates in the District Court and for administrative law judges in administrative agencies.

This Court has repeatedly recognized that the decision-maker in litigation cannot have other interests that conflict with fair and impartial decision-making. The emphasis on efficiency in the Staff Lawyer's work and that of the "special panel" creates this very conflict that violates principles recognized in *Connolly v.*

Georgia, 429 U.S. 245 (1977) and *Marshall v. Jerrico, 446 U.S. 238 (1980).*

Petitioner presented the following challenging questions in his Petition for Rehearing En Banc along with the other arguments set out here.

> "Appellant seriously questions whether the judges assigned to his case provided the same close scrutiny and deliberate review that they give to matters that are given oral argument. Were Chambers Clerks used to review the briefs and cases cited? Was a bench memo prepared? Did all three judges read the briefs thoroughly?

The D.C. Circuit took up the challenge only in part when it said:

> **ORDERED** that the petition be denied. Insofar as appellant argues the court improperly relies on staff attorneys to screen cases for suitability for oral argument and decide unargued cases, he should be aware that a case can be decided without oral argument if three judges unanimously vote to do so. D.C. Circuit Handbook of Practice and Internal Procedures 49 (2002). Moreover, it is a panel of three judges that actually decides the case. Order of Denial of Rehearing En Banc, Appendix.

Casting votes is not the same as fully reviewing the record and the briefs. Nor did the Circuit Court dispute Petitioner's claims about how the Staff Lawyer system works.

V. THE CIRCUIT COURT'S JUDGMENT VIOLATED THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS OF LIBERAL ALLOWANCE OF AMENDMENT OF PLEADINGS IN NOT ALLOWING PETITIONER TO FILE EVEN ONE AMENDED COMPLAINT.

The Circuit Court concludes that Judge Huvelle's decision to deny Petitioner leave to amend his original complaint even once was proper, given that such amendment "would not have cured the deficiency" of standing.

The only specific arguments of Petitioner that the D.C. Circuit's judgment actually mentions are those relating to his concrete fiscal and aesthetic interests damaged by the Department of Education's regulatory shift. However, the judgment does not address those arguments but dismisses them with the grossly mistaken conclusion that Petitioner did not raise them below. In fact, Appellant did raise these arguments below. In his response to the Government's motion to dismiss, Appellant expressly cited *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 120 S.Ct. 693 (2000) in support of the proposition that "fiscal, aesthetic and recreational interests" such as those described in the initial complaint, do satisfy the requirements of standing. He explicitly set out his concerns about increased costs to the ABA and his interests in improving legal education. Memorandum in Response to Defendant's Motion to Dismiss 11-14, Appendix.

Both courts insisted that even at the pleading stage a plaintiff must establish absolute and direct causal linkages between regulatory actions and injury, and that redress will absolutely result in a return to the status quo before the agency's action and is not just a preponderant or highly likely possibility. The Circuit Court required an unduly high level of certainty of redress by upholding the district court's refusal to allow Appellant to file even one amended complaint. This is contrary to established law that "[a] dismissal with prejudice is warranted only when a trial court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency" *Firestone v.* Firestone, 76 F.3d 1205 (D.C. Cir. 76 F.3d at 1209. (internal quotations omitted.)

Plaintiff should have been granted leave to file an amended complaint under the liberal provisions of Federal Rule of Civil Procedure 15(a), providing that leave to amend "shall be freely given when justice so requires." Judge Huvelle erred in ruling that Plaintiff would only be allowed to amend his complaint to allege facts unknown to him when he filed his original complaint. Such is not the law and is contrary to Rule 15's requirement of liberal amendment of the complaint. Fed. Rules of Civil Procedure, Rule 15.

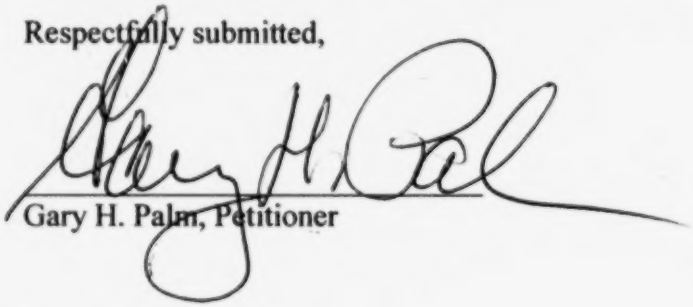
DOE in its Appellee's brief did not dispute Plaintiff's argument under Rule 15(a) but justified foreclosing any amendment because it argued that DOE and its lawyer could not imagine any facts that Plaintiff could allege that would show standing. Since DOE recognized the de novo nature of review of a dismissal which also includes any facts that can be imagined from the facts alleged in the complaint, the Circuit Court should have considered Petitioner's arguments about fiscal and aesthetic injuries. This is especially true because the Circuit Court itself recognized that concerns about dues increases and cutbacks in services might well be injuries in fact had they been alleged more clearly below. The case should have been remanded to allow Plaintiff to amend the complaint at least once especially since Plaintiff raised these arguments in his briefs in the District Court. (Appendix)

This case should also be remanded to allow Plaintiff to file an Amended Complaint as a derivative action against DOE or to join the ABA as a party Defendant. For the first time in its brief in the D.C. Circuit, DOE suggested that Plaintiff should bring a derivative action in state court against the ABA. By definition, a derivative action is brought by a member on behalf of the organization against a third party (like the Secretary of Education). But since DOE and Judge Huvelle both agree that the ABA would have standing, then Plaintiff would have standing to act on behalf of the ABA in a derivative action. Judge Huvelle had ruled that the fact that "the ABA may have standing as an institution to allege injury caused by the Secretary's regulations does not mean that a lone member, such as Plaintiff, has the authority to allege institutional injury on its behalf." Apparently, DOE takes a different view than Judge Huvelle with respect to a derivative action under Federal Rules of Civil Procedure Rule 23.1. Plaintiff requested that the D.C. Circuit remand so that he could amend his complaint to make a derivative claim as well. DOE's suggestion justified a remand for a derivative action in federal court since a lone member has the authority to maintain a derivative action on behalf of the American Bar Association. Petitioner also requested a remand to join the ABA as a defendant.

CONCLUSION

Petitioner requests that the Petition for Writ of Certiorari be granted and this case be heard and decided on the merits. In the alternative, Petitioner requests that the Court take summary action to remand the case for reconsideration in light of *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed.2d, (Feb. 26, 2002) and to remand for Petitioner to file an amended complaint.

Respectfully submitted,



Gary H. Palm, Petitioner

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Dated: February 5, 2003

(2)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States

GARY H. PALM,

Petitioner,

v.

RODERICK R. PAIGE, SECRETARY OF EDUCATION,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The District of Columbia

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5371
September Term, 2002

01cv00439

Gary H. Palm, **Filed**
On: August 9, 2002
Appellant

v.

Roderick R. Paige, Secretary of Education,
Appellee

Consolidated with 02-5010

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEFORE: Edwards, Sentelle, and Rogers, Circuit Judges

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. The court has determined that the issues presented occasion no need for an opinion. See Fed. R. App. P. 36; D.C. Cir. Rule 36(b). It is

ORDERED AND ADJUDGED that the district court's orders filed September 6, 2001, and December 7, 2001, be affirmed. The district court properly dismissed this action for lack of standing because appellant's allegations do not meet the "irreducible constitutional minimum" requirements for standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal quotations omitted). None of the injuries appellant alleges, which generally relate to the transfer of decisionmaking authority over accreditation matters within the American Bar Association, constitutes an injury in fact. See Diamond v. Charles, 476 U.S. 54, 66 (1986). Moreover, none of the asserted injuries can fairly be traced to appellee's application of the "separate and independent" regulations to the American Bar Association. Rather, those injuries flow from the American Bar Association's restructuring of its own accreditation process, and therefore are the result of "independent action of [a] third party not before the court." Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42 (1976). The involvement of independent actors in the challenged actions also precludes a finding that the alleged injuries are redressable. Cf. Lujan, 504 U.S. at 571 (rejecting as "entirely conjectural" claim that "non-agency activity" would be affected by "agency activity" plaintiffs sought). Finally, even at the pleading stage, the allegations in the complaint must meet the requirements for standing. See, e.g., Bristol Meyers Squibb Co. v. Shalala, 91 F.3d 1493, 1497-99 (D.C. Cir. 1996).

Nor did the district err in denying leave to amend the complaint. Once the complaint was dismissed appellant required the court's leave to amend the complaint. See Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (per curiam). Leave was properly denied in this case because the proposed amendment would not have conferred standing. Cf. Confederate Memorial Ass'n. Inc. v. Hines, 995 F.2d

295, 299 (D.C. Cir. 1993) (district court properly denied leave to amend complaint dismissed for failure to state a claim because amendment would not have cured the deficiency.)

Appellant also contends for the first time on appeal that as an American Bar Association member, he has an interest in avoiding "increased dues and cutbacks in membership services" resulting from "on-going and future anti trust violations and violations of other laws" by the Association, and that his interest in "eliminating corruption, conflicts of interest and illegal conduct" in the accreditation process is "equal to aesthetic and recreational interests" that have been deemed sufficient to support standing. Because appellant failed to present these arguments to the district court, the court will not consider them. See District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1078-79(D.C. Cir. 1984).

In any event, neither of appellant's new arguments demonstrates standing. Although service cutbacks and increased dues might establish an injury in fact for American Bar Association members like appellant, appellant has failed to demonstrate that these injuries are fairly traceable to appellee's application of its "separate and independent" regulations to the American Bar Association, or that declaring those regulations inapplicable to the American Bar Association would redress the injuries. And appellant offers no reasoning to support the analogy he suggests between his asserted injuries and the aesthetic and recreational interests that may establish standing in environmental cases.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any

timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-5371
September Term, 2002

01cv00439

Gary H. Palm,
On: November 7, 2002
Appellant

Filed

v.

Roderick R. Paige, Secretary of Education,
Appellee

Consolidated with 02-5010

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland,* Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the supplement thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied. Insofar as appellant argues the court improperly relies on staff attorneys to screen cases for suitability for oral argument and decide unargued cases, he should be aware that a case can be decided without oral argument only if three judges unanimously vote to do so. D.C. Circuit Handbook of Practice and Internal Procedures 49 (2002). Moreover, it is a panel of three judges that actually decides the case. Id. at 30, 49.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:
Michael C. McGrail
Deputy Clerk

* Circuit Judge Garland did not participate in this matter.

OPINION BY: ELLEN SEGAL HUVELLE

MEMORANDUM OPINION

Plaintiff Gary **Palm,** a former clinical professor of law and American Bar Association ("ABA") member, has brought this pro se suit seeking to invalidate certain regulations promulgated by defendant, the Secretary of Education, pursuant to the Higher Education Act of 1965 ("HEA"), 20 U.S.C. § 1070 et seq., and in particular to invalidate their application to the ABA. Defendant has moved to dismiss pursuant to Fed. R. Civ. P. 12 (b), arguing that plaintiff lacks standing to bring this action. For the reasons set forth more fully below, the Court agrees and therefore will dismiss the complaint with prejudice.

BACKGROUND

Since 1952, the Council of the ABA Section of Legal Education **[**2]** and Admissions to the Bar ("the Council") has periodically applied for and received recognition by the Secretary as a "nationally recognized accrediting agency" under § 496 of the HEA, 20 U.S.C. § 1099b. In that capacity, the Council accredits institutions of higher learning, specifically independent free-standing law schools that are not affiliated with

a larger university. Traditionally, the Council's accrediting standards and decisions had been subject to final review by the ABA's House of Delegates, the body of ABA members that sets policy for the ABA and supervises and directs the actions of ABA sections and committees. In 1992, Congress amended the HEA to require that certain accrediting agencies seeking recognition by the Secretary either be "separate and independent" of any affiliated trade or professional membership organization, or qualify for a waiver of the separate and independent requirement under criteria to be prescribed by the Secretary. 20 U.S.C. § 1099b(a)(3), (b). In 1997, when the Council first came before the Secretary for a renewal of its recognition under the Act as amended in 1992, the Secretary informed it **[**3]** that under the separate and independent requirement, the Council could not retain its recognition unless it had final decisionmaking authority over accrediting decisions and standards, which at that time remained with the House of Delegates. Therefore, the ABA and the Council devised a restructuring plan that would vest final decisionmaking authority in the Council. Under the new structure, Council decisions regarding accreditation of a particular institution would be subject to up to two advisory appeals to the House of Delegates, which has the authority to remand to the Council for further consideration, with ultimate authority vested in the Council to make the final determination at the conclusion of this process. See United States v. American Bar Assoc., 135 F. Supp. 2d 28, 30 (D.D.C. 2001).

The implementation of this new structure required modification of an existing Consent Decree entered into between the ABA and the United States Department of Justice, Antitrust Division. The modification to that Consent Decree was approved by The Honorable Royce C. Lamberth as "advancing the public interest." Id. at 32.

Plaintiff filed comments in that matter, **[**4]** raising objections that the regulations requiring the change to the accreditation structure and procedure were inconsistent with the HEA. Compl. P 21. Plaintiff has now brought this suit, claiming that the regulations have been applied contrary to the HEA and in excess of the Secretary's authority under the HEA. n1 The essence of **[*29]** plaintiff's complaint is that he is dissatisfied with the fact that the House of Delegates no longer has the authority to adopt accreditation standards and to make final accreditation decisions. See Compl. PP 3-5, 8, 10-11.

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n1 Although plaintiff does not specify in his complaint, it must be presumed that he is attempting to bring this suit under the Administrative Procedures Act, 5 U.S.C. § 701 et seq., since there is no private right of action to sue under the HEA.

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I. STANDARD OF REVIEW

HN1 The Court grants a motion to dismiss only when the "plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). **[**5]** In reaching this determination, the "complaint must be liberally construed in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged." Schuler v. United States, 199 U.S. App. D.C. 23, 617 F.2d 605, 608 (D.C. Cir. 1979) (citation and internal quotation marks omitted). "However, the court need not accept inferences drawn by plaintiff[] if such

inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." Kowal v. MCI Communications Corp., 305 U.S. App. D.C. 60, 16 F.3d 1271, 1276 (D.C. Cir. 1994). n2

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n2 Plaintiff has alleged additional facts, not contained in the complaint, in his opposition to defendant's motion which, for the purposes of this motion, the Court will assume are true. However, as discussed above, the Court will not credit inferences which are not supported by the facts alleged in the complaint or in plaintiff's opposition.

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II. STANDING

HN2 To meet the "irreducible constitutional minimum" requirements for Article III standing, a plaintiff bears the burden of showing that: (1) he has suffered an injury which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical; (2) there is a causal connection between the alleged injury and conduct that is fairly traceable to the defendant, and not the result of the independent action of some third party not before the court; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). Because the elements of standing are "not mere pleading requirements, but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the

burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Id. at 561. If "plaintiffs' standing does not adequately appear from all materials of record, the complaint must **[**7]** be dismissed." Warth v. Seldin, 422 U.S. 490, 502, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975).

In this case, the complaint fails to allege any of the three elements required to establish standing. The complaint describes plaintiff as a member of the ABA, a former professor at an ABA accredited law school, a former member of the ABA Accreditation Committee, a former member of the Council, and a former Chair of the Illinois State Bar Association's Committee on Legal Education, Admissions, and Competence, which proposed revisions to the ABA accreditation standards that were not adopted by the Council. Compl. PP 1-4. The complaint also details plaintiff's general dissatisfaction with the validity of the regulations, their inconsistency with the HEA, the Secretary's authority to impose their requirements, and the manner in which the ABA adopted the changes to their accreditation process. The complaint is silent as to injury in fact, causation, **[*30]** and redressability. HN3 Such general grievances as those set out in the complaint are insufficient to establish plaintiff's standing to bring this lawsuit. See Lujan, 504 U.S. at 573-74 ("HN4 We have consistently held that **[**8]** a plaintiff raising only a generally available grievance about government--claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large--does not state an Article III case or controversy.").

HN5 That the ABA may have standing as an institution to allege injury caused by the Secretary's regulations does not mean that a lone

member, such as plaintiff, has the authority to allege institutional injury on its behalf. See, e.g., Raines v. Byrd, 521 U.S. 811, 829, 138 L. Ed. 2d 849, 117 S. Ct. 2312 (1997) ("In sum, appellees [individual members of Congress] have alleged no injury to themselves as individuals, the institutional injury they allege is wholly abstract and widely dispersed, and their attempt to litigate this dispute at this time and in this form is contrary to historical experience. We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit.") (internal citations omitted); Lujan, 504 U.S. at 560 n.1 **[**9]** ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way."); Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 544, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986) ("[Appellant's] status as a School Board member does not permit him to 'step into the shoes of the Board' and invoke its right to appeal. In this case, [appellant] was apparently the lone dissenter in a decision by the other eight members of the School Board to forgo an appeal. Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take."). Indeed, plaintiff acknowledges that he has not brought this suit on behalf of the ABA or the Section on Legal Education, but on his own behalf. (Opp. at 15-16.)

Plaintiff seeks HN6 to remedy the glaring insufficiency of his complaint by establishing the elements of standing in his arguments in opposition to defendant's motion to dismiss. Plaintiff must establish an injury that he has suffered as a result of defendant's application of the regulations to the ABA. See Warth, 422 U.S. at 499 ("HNZ A federal court's jurisdiction therefore can be invoked **[**10]** only when the plaintiff himself has suffered 'some threatened

or actual injury resulting from the putatively illegal action.'") (citation omitted). Plaintiff argues in his opposition that his voting rights as a member of the ABA have been diluted by the regulations. The only voting right plaintiff specifically refers to is that as a member of the ABA Section on Legal Education, he votes on electing members of the Council. (Opp. at 7.) Plaintiff claims that because of the "group membership program," which he alleges allows law schools to pay for ABA and Section membership for faculty and administrators, membership in the Section which elects Council members is composed of 80% law school paid members and 20% non-law school paid members. (Id.) As an initial matter, plaintiff does not explain how the "separate and independent" regulations that he challenges have anything to do with the "group membership program," or how applying the separate and independent requirement to the ABA accreditation process impacts or dilutes his ability as a Section member to vote for Council members. That plaintiff does not like the composition of ABA Section members who **[*31]** elect Council members is not an **[**11]** injury that flows in any way from the Secretary's application of the separate and independent requirement, nor would it be redressed by this Court's invalidation of those regulations. Moreover, plaintiff does not explain how his voting rights have been diluted by the regulations or how a favorable decision in this suit would restore them.

Plaintiff's conclusory allegations that his voting rights have been diluted seem to be premised on his assumption that the Council will not act in a manner consistent with his goals and proposals with respect to accreditation standards and that the House of Delegates might act differently. n3 This and other purported injuries that plaintiff alleges do not flow from the allegedly invalid regulations, but from actions that plaintiff speculates that the Council will take with respect to accreditation matters that

he also speculates would not be taken if the House of Delegates retained its role in ABA accreditation matters. Plaintiff's alleged injury is that he anticipates some Council actions will be contrary to what plaintiff believes is the proper direction for accreditation standards and the future of legal education. Plaintiff has alleged nothing **[**12]** more than a speculative possibility that the Council will take action, shielded from review by the House of Delegates, with which he disagrees. Such injuries are "conjectural or hypothetical," not "actual or imminent." Lujan, 504 U.S. at 560 (citation and internal quotation marks omitted). As the Supreme Court noted in Diamond v. Charles, 476 U.S. 54, 66-67, 90 L. Ed. 2d 48, 106 S. Ct. 1697 (1986), "although [plaintiff's] allegation may be cloaked in the nomenclature of a special professional interest, it is simply the expression of a desire that the [law] as written be obeyed. HN8↑Article III requires more than a desire to vindicate value interests. It requires an 'injury in fact' that distinguishes 'a person with a direct stake in the outcome of a litigation--even though small--from a person with a mere interest in the problem.'" Here, plaintiff "has an interest, but no direct stake" in the process by which the ABA makes accreditation decisions. Id. at 67. Moreover, "where there is no current injury, and a party relies wholly on the threat of future injury, the fact that the party (and the court) can imagine circumstances in which **[**13]** [the party] could be affected by the agency's action is not enough." Northwest Airlines v. FAA, 254 U.S. App. D.C. 150, 795 F.2d 195, 201 (D.C. Cir. 1986) (citation and internal quotation marks omitted). "The injury requirement will not be satisfied simply because a chain of events can be hypothesized in which the action challenged eventually leads to actual injury." Id.

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n3 Similarly, plaintiff also argues that he is "active in other organizations which regularly address accreditation matters with the ABA," such as the Clinical Legal Education Association ("CLEA") and the Legal Education, Admissions, and Competence Committee of the Illinois State Bar Association, and that he participates in the process of proposing and developing accreditation standards with these organizations. (Opp. at 8, 11.) Plaintiff alleges that the effectiveness of these organizations "will be greatly diminished" and their bargaining strength "greatly reduced" (Opp. at 9) because they can no longer achieve their goals by obtaining favorable action on accreditation matters from the House of Delegates.

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- - - - - - - - - - - - - - - - - **[**14]**

Even if such speculation were sufficient to establish injury, which it is not, the Council's substantive decisions on matters of accreditation do not flow from the Secretary's requirement that the Council be separate and independent from the ABA. "HN9↑A court may act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent **[*32]** action of some third party not before the court." Northwest Airlines, 795 F.2d at 203-04 (citation and internal quotation marks omitted). See also Lujan, 504 U.S. at 560 (there must be a causal connection between the alleged injury and conduct that is fairly traceable to the defendant, and not the result of the independent action of some third party not before the court); Mideast Systems and China Civil Construction Saipan Joint Venture, Inc. v. Hodel, 253 U.S. App. D.C. 218, 792 F.2d 1172, 1177 (D.C. Cir. 1986) ("the presence of an independent variable between either the harm and the relief or the harm and the conduct makes causation sufficiently tenuous

that standing should be denied"). "When the impact of the government action challenged **[**15]** is that indirect, it will generally be very difficult to establish the causative relationship necessary to demonstrate article III standing." Northwest Airlines, 795 F.2d at 204.

Nor would the Council's ability to make whatever accreditation decisions it chooses be eliminated if this Court were to invalidate the regulations at issue. The accreditation procedure is now mandated by the Consent Decree in United States v. American Bar Assoc., 135 F. Supp. 2d 28, and plaintiff has no standing to seek modification of that Consent Decree to alter that procedure. That the ABA and/or the Department of Justice would be free to seek such relief does not establish that it is "likely as opposed to merely speculative" that plaintiff's injury would be "redressed by a favorable decision." Lujan, 504 U.S. at 561 (citation and internal quotation marks omitted). "HN10↑Courts have been loath to find standing when redress depends largely on policy decisions yet to be made by" third parties or government officials, "because the question of whether [plaintiff's] claims of . . . injury would be redressed by a favorable decision in such a case depends on the **[**16]** unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." US Ecology, Inc. v. Dep't of the Interior, 343 U.S. App. D.C. 386, 231 F.3d 20, 24 (D.C. Cir. 2000) (citation and internal quotation marks omitted). "When redress depends on the cooperation of a third party, 'it becomes the burden of the [plaintiff] to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.'" 231 F.3d at 24-25 (quoting Lujan, 504 U.S. at 562). n4 Finally, even if the role of the House of Delegates were restored, it is wholly speculative that it would act in a manner

consistent with plaintiff's proposals and opinions as to what accreditation decisions should be made and what accreditation standards should be adopted. n5

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n4 For the same reasons, plaintiff's argument that he is relying on a particular ABA accreditation standard in his wrongful termination action against the University of Chicago Law School also fails to establish his standing to bring this suit. Plaintiff alleges that his position as a clinical professor was not renewed and that Accreditation Standard 405(c) requires that clinical faculty members have a form of security in their positions reasonably similar to tenure. Plaintiff alleges that this standard has been under review since the role of the House of Delegates in developing accreditation standards was eliminated. Again, the fact that the Council is considering action with which he disagrees and that he apparently believes the House of Delegates would not take does not constitute an injury, caused by the regulations at issue, that would be redressed by the Court in this case. **[**17]**

n5 Plaintiff's argument that under Illinois law, a member of a not-for-profit organization may sue that organization to enforce the organization's constitutional provisions in no way provides him with standing to sue the Department of Education regarding its regulations. At best, the analogy arguably supports his standing under that law to sue one of the organizations to which he belongs -- none of which are defendants in this suit. It has no bearing on plaintiff's standing to sue a federal agency alleging that regulations it promulgated are inconsistent with a federal statute and beyond the scope of the agency's authority.

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CONCLUSION

For the foregoing reasons, plaintiff lacks standing to bring this lawsuit and it will be dismissed with prejudice. A separate order accompanies this opinion.

ELLEN SEGAL HUVELLE
United States District Judge
Date: September 4, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GARY H. PALM,	)	**FILED**
20, 2001	)	**NOV**
	)	
Plaintiff,	)	
	)	**Civil**
Action No. 01-00439 (ESH)		
v.	)	
	)	
RODERICK R. PAIGE,	)	
SECRETARY OF EDUCATION,	)	
	)	
Defendant.	)	
	)	

ORDER

The Court has before it plaintiff's Motion to Vacate Order Denying Plaintiff's Motion for Reconsideration of Dismissal With Prejudice and for oral argument. Having

reviewed the governing case law regarding Fed. Rule Civ. Proc. 58 see e.g., United States v. Haynes, 158 F.3d 1327 (D.C. Cir. 1998), the Court is persuaded that its Order of October 30, 2001 does not comply with the requirement of a "separate document" Therefore, the Court will vacate the Order filed on October 30, 2001 and will give plaintiff until December 3, 2001 to file any reply memorandum in support of his motion for reconsideration. Given this ruling, there is no need for oral argument on this motion.

Accordingly, it is this 19th day of November, 2001, hereby

ORDERED that plaintiff's motion to vacate order denying plaintiff's motion for reconsideration of dismissal is **GRANTED**, but his request for oral argument is **DENIED**; and it is **FURTHER ORDERED** that plaintiff shall file his reply memorandum on or before December 3, 2001.

SO ORDERED.

ELLEN SEGAL HUVELLE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GARY H. PALM,	**FILED DEC 07, 2001**
Plaintiff,	**Civil Action No. 01-00439 (ESH)**
v.	
RODERICK R. PAIGE, SECRETARY OF EDUCATION,	
Defendant.	

MEMORANDUM OPINION

Pursuant to the Court's Order of November 20, 2001, plaintiff has filed a Reply Memorandum in Support of Plaintiff's Motion for Reconsideration of Dismissal of the

Complaint with Prejudice. Plaintiff further requests "oral argument to clarify the issues and the status of the case." Finally, plaintiff has filed an Amended Complaint As of Right.

Plaintiff is proceeding on a totally inaccurate premise. He appears to be misreading the Court's Order of November 20, 2001, in order to put himself in the position of arguing that the case is still pending.[1] That is simply not the case. The Court's Order of November 20, 2001, was crystal clear: it did not vacate the order of dismissal entered on September 4, 2001; rather, it vacated only the October 30, 2001 order denying plaintiff's motion for reconsideration. As of November 20, the status of this case was that it had been dismissed with prejudice pursuant to an order filed on September 4, 2001, and there was a pending motion for reconsideration, an opposition to that motion that had been

[1] Although plaintiff is proceeding *pro se*, he is a lawyer and a former law professor, so there can be absolutely no excuse for his disregard of the Court's Order of November 20, 2001, nor can there be any reason for his professed confusion over the status of this case.

filed by the defendant, and plaintiff was granted until December 3, 2001 to file a reply. In short, there is no basis for plaintiff to argue that "no judgment is effective at this time;" "the court has already recognized that its Order of Dismissal dated September 4, 2001 did not amount to entry of a judgment and therefore was not a Final Order;" or that plaintiff is entitled "to file an Amended Complaint As of Right."

With respect to plaintiff's Amended Complaint as of Right, plaintiff's belated attempt to recast this case or to amplify his prior complaint must be rejected. Although motions to amend a complaint are to be liberally granted under Fed. R. Civ. P. Rule 15(a), plaintiff must first obtain relief from judgment. See 6 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1489 at 694 (2d ed, 1990); Confederate Memorial Ass'n, Inc. v. Hines, 995 F.2d 295, 299 (D.C. Cir. 1993). However, as explained herein, since plaintiff is not entitled to have the

judgment set aside, he is not entitled to file an amended complaint as of right.

With respect to plaintiff's motion for reconsideration, the Court has carefully considered plaintiff's motion, the defendant's opposition and plaintiff's reply memorandum. It remains convinced that the motion should be denied whether one were to apply Rule 59(e) or Rule 60(b). As previously indicated, plaintiff presents many of he same arguments which were previously addressed in this Court's September 4 Memorandum and Opinion. As the Court found, any arguable dilution of his voting power in the ABA does not give him the right to sue defendant, since an alleged injury was speculative, no concrete, did not result from the allegedly invalid regulation, and is not redressable. Palm v. Paige, 171 F.Supp.2d 26, 31-32 (D.D.C. 2001). To the extent that plaintiff attempts at this late date to circumvent that ruling by recasting his complaint, this attempt must be rejected. Any allegedly new facts or theories that plaintiff

now seeks to add to his complaint regarding the dilution of his rights to vote in the ABA as a result of defendant's regulations were well known to the plaintiff at the time he filed this action. Thus, he cannot argue that there is new evidence that was not previously available to him which would alter the Court's decision. See Firestone v. Firestone, 7(F.3d 1205, 1208 (D.C. Cir. 1996).

Accordingly, it is this 6th day of December, 2001, hereby

ORDERED that plaintiff's motion for reconsideration [24-1 and 24-2] are **DENIED**. A separate order accompanies this Opinion.

ELLEN SEGAL HUVELLE
United States District Judge

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, plaintiff's motion [24-1 and 24-2] for reconsideration is **DENIED**.

Plaintiff's complaint is **DISMISSED WITH PREJUDICE**.

This is a final appealable order.

ELLEN SEGAL HUVELLE
United States District Judge

Dated: 12/6/01

Higher Education Act, 20 USCS § 1099b. Recognition of accrediting agency or association

(a) Criteria required. No accrediting agency or association may be determined by the Secretary to be a reliable authority as to the quality of education or training offered for the purposes of this Act or for other Federal purposes, unless the agency or association meets criteria established by the Secretary pursuant to this section. The Secretary shall, after notice and opportunity for a hearing, establish criteria for such determinations. Such criteria shall include an appropriate measure or measures of student achievement. Such criteria shall require that—

(1) the accrediting agency or association shall be a State, regional, or national agency or association and shall demonstrate the ability and the experience to operate as an accrediting agency or association within the State, region, or nationally, as appropriate;

(2) such agency or association—

(A) (i) for the purpose of participation in programs under this Act, has a voluntary membership of institutions of higher education and has as a principal purpose the accrediting of institutions of higher education; or

(ii) for the purpose of participation in other programs

administered by the Department of Education or other Federal agencies, has a voluntary membership and has as its principal purpose the accrediting of institutions of higher education or programs;

(B) is a State agency approved by the Secretary for the purpose described in subparagraph (A); or

(C) is an agency or association that, for the purpose of determining eligibility for student assistance under this title, conducts accreditation through (i) a voluntary membership organization of individuals participating in a profession, or (ii) an agency or association which has as its principal purpose the accreditation of programs within institutions, which institutions are accredited by another agency or association recognized by the Secretary;

(3) if such agency or association is an agency or association described in—

(A) subparagraph (A)(i) of paragraph (2), then such agency or association is separate and independent, both administratively and financially of any related, associated, or affiliated trade association or membership organization;

(B) subparagraph (B) of paragraph (2), then such agency or association has been recognized by the Secretary on or before October 1, 1991; or

(C) subparagraph (C) of paragraph (2) and such agency or association has been recognized by the Secretary on or before October 1, 1991, then the Secretary may waive the requirement that such agency or association is separate and independent, both administratively and financially of any related, associated, or affiliated trade association or membership organization upon a demonstration that the existing relationship has not served to compromise the independence of its accreditation process;

(4) such agency or association consistently applies and enforces standards that ensure that the courses or programs of instruction,

training, or study offered by the institution of higher education, including distance education courses or programs, are of sufficient quality to achieve, for the duration of the accreditation period, the stated objective for which the courses or the programs are offered;

(5) the standards for accreditation of the agency or association assess the institution's—

(A) success with respect to student achievement in relation to the institution's mission, including, as appropriate, consideration of course completion, State licensing examinations, and job placement rates;

(B) curricula;

(C) faculty;

(D) facilities, equipment, and supplies;

(E) fiscal and administrative capacity as appropriate to the specified scale of operations;

(F) student support services;

(G) recruiting and admissions practices, academic calendars, catalogs, publications, grading and advertising;

(H) measures of program length and the objectives of the degrees or credentials offered;

(I) record of student complaints received by, or available to, the agency or association; and

(J) record of compliance with its program responsibilities under title IV of this Act based on
the most recent student loan default rate data provided by the Secretary, the results of financial or compliance audits, program reviews, and any such other information as the Secretary may provide to the agency or association;

except that subparagraphs (A), (H), and (J) shall not apply to agencies or associations described in paragraph (2)(A)(ii) of this subsection;

(6) such agency or association shall apply procedures throughout the accrediting process, including evaluation and withdrawal proceedings, that comply with due process, including--

(A) adequate specification of requirements and deficiencies at the institution of higher education or program being examined;

(B) notice of an opportunity for a hearing by any such institution;

(C) the right to appeal any adverse action against any such institution; and

(D) the right to representation by counsel for any such institution;

(7) such agency or association shall notify the Secretary and the appropriate State licensing or authorizing agency within 30 days of the accreditation of an institution or any final denial, withdrawal, suspension, or termination of accreditation or placement on probation of an institution, together with any other adverse action taken with respect to an institution; and

(8) such agency or association shall make available to the public, upon request, and to the Secretary, and the State licensing or authorizing agency a summary of any review resulting in a final accrediting decision involving denial, termination, or suspension of accreditation, together with the comments of the affected institution.

(b) Separate and independent defined. For the purpose of subsection (a)(3), the term "separate and independent" means that--

(1) the members of the postsecondary education governing body of the accrediting agency or association are not elected or selected by the board or chief executive officer of any related, associated,

or affiliated trade association or membership organization;

(2) among the membership of the board of the accrediting agency or association there shall be one public member (who is not a member of any related trade or membership organization) for each six members of the board, with a minimum of one such public member, and guidelines are established for such members to avoid conflicts of interest;

(3) dues to the accrediting agency or association are paid separately from any dues paid to any related, associated, or affiliated trade association or membership organization; and

(4) the budget of the accrediting agency or association is developed and determined by the accrediting agency or association without review or resort to consultation with any other entity or organization.

(c) Operating procedures required. No accrediting agency or association may be recognized by the Secretary as a reliable authority as to the quality of education or training offered by an institution seeking to participate in the programs authorized under this title, unless the agency or association--

(1) performs, at regularly established intervals, on-site inspections and reviews of institutions of higher education (which may include unannounced site visits) with particular focus on educational quality and program effectiveness, and ensures that accreditation team members are well-trained and knowledgeable with respect to their responsibilities;

(2) requires that any institution of higher education subject to its jurisdiction which plans to establish a branch campus submit a business plan, including projected revenues and expenditures, prior to opening the branch campus;

(3) agrees to conduct, as soon as practicable, but within a period of not more than 6 months of the establishment of a new branch campus or a change of ownership of an institution of higher education, an on-site visit of that branch campus or of the

institution after a change of ownership;

(4) requires that teach-out agreements among institutions are subject to approval by the accrediting agency or association consistent with standards promulgated by such agency or association;

(5) maintains and makes publicly available written materials regarding standards and procedures for accreditation, appeal procedures, and the accreditation status of each institution subject to its jurisdiction; and

(6) discloses publicly whenever an institution of higher education subject to its jurisdiction is being considered for accreditation or reaccredidation.

(d) Length of recognition. No accrediting agency or association may be recognized by the Secretary for the purpose of this Act for a period of more than 5 years.

(e) Initial arbitration rule. The Secretary may not recognize the accreditation of any institution of higher education unless the institution of higher education agrees to submit any dispute involving the final denial, withdrawal, or termination of accreditation to initial arbitration prior to any other legal action.

(f) Jurisdiction. Notwithstanding any other provision of law, any civil action brought by an institution of higher education seeking accreditation from, or accredited by, an accrediting agency or association recognized by the Secretary for the purpose of this title and involving the denial, withdrawal, or termination of accreditation of the institution of higher education, shall be brought in the appropriate United States district court.

(g) Limitation on scope of criteria. Nothing in this Act shall be construed to permit the Secretary to establish criteria for accrediting agencies or associations that are not required by this section. Nothing in this Act shall be construed to prohibit or limit any accrediting agency or association from adopting additional standards not provided for in this section.

(h) Change of accrediting agency. The Secretary shall not recognize the accreditation of any otherwise eligible institution of higher education if the institution of higher education is in the process of changing its accrediting agency or association, unless the eligible institution submits to the Secretary all materials relating to the prior accreditation, including materials demonstrating reasonable cause for changing the accrediting agency or association.

(i) Dual accreditation rule. The Secretary shall not recognize the accreditation of any otherwise eligible institution of higher education if the institution of higher education is accredited, as an institution, by more than one accrediting agency or association, unless the institution submits to each such agency and association and to the Secretary the reasons for accreditation by more than one such agency or association and demonstrates to the Secretary reasonable cause for its accreditation by more than one agency or association. If the institution is accredited, as an institution, by more than one accrediting agency or association, the institution shall designate which agency's accreditation shall be utilized in determining the institution's eligibility for programs under this Act.

(j) Impact of loss of accreditation. An institution may not be certified or recertified as an institution of higher education under section 102 and subpart 3 of this part [20 USCS §§ 1002, 1099c et seq.] or participate in any of the other programs authorized by this Act if such institution--

(1) is not currently accredited by any agency or association recognized by the Secretary;

(2) has had its accreditation withdrawn, revoked, or otherwise terminated for cause during the preceding 24 months, unless such withdrawal, revocation, or termination has been rescinded by the same accrediting agency; or

(3) has withdrawn from accreditation voluntarily under a show cause or suspension order during the preceding 24 months, unless such order has been rescinded by the same accrediting agency.

(k) Religious institution rule. Notwithstanding subsection (j), the Secretary shall allow an institution that has had its accreditation withdrawn, revoked, or otherwise terminated, or has voluntarily withdrawn from an accreditation agency, to remain certified as an institution of higher education under section 102 and subpart 3 of this part [20 USCS §§ 1002, 1099c et seq.] for a period sufficient to allow such institution to obtain alternative accreditation, if the Secretary determines that the reason for the withdrawal, revocation, or termination--

(1) is related to the religious mission or affiliation of the institution; and

(2) is not related to the accreditation criteria provided for in this section.

(l) Limitation, suspension, or termination of recognition.

(1) If the Secretary determines that an accrediting agency or association has failed to apply effectively the criteria in this section, or is otherwise not in compliance with the requirements of this section, the Secretary shall--

(A) after notice and opportunity for a hearing, limit, suspend, or terminate the recognition of the agency or association; or

(B) require the agency or association to take appropriate action to bring the agency or association into compliance with such requirements within a timeframe specified by the Secretary, except that--

(i) such timeframe shall not exceed 12 months unless the Secretary extends such period for good cause; and

(ii) if the agency or association fails to bring the agency or association into compliance within such timeframe, the Secretary shall, after notice and opportunity for a hearing, limit, suspend, or terminate the recognition of the agency or association.

(2) The Secretary may determine that an accrediting agency or association has failed to apply effectively the standards provided in this section if an institution of higher education seeks and receives accreditation from the accrediting agency or association during any period in which the institution is the subject of any interim action by another accrediting agency or association, described in paragraph (2)(A)(i), (2)(B), or (2)(C) of subsection (a) of this section, leading to the suspension, revocation, or termination of accreditation or the institution has been notified of the threatened loss of accreditation, and the due process procedures required by such suspension, revocation, termination, or threatened loss have not been completed.

(m) Limitation on the Secretary's authority. The Secretary may only recognize accrediting agencies or associations which accredit institutions of higher education for the purpose of enabling such institutions to establish eligibility to participate in the programs under this Act or which accredit institutions of higher education or higher education programs for the purpose of enabling them to establish eligibility to participate in other programs administered by the Department of Education or other Federal agencies.

(n) Independent evaluation.

(1) The Secretary shall conduct a comprehensive review and evaluation of the performance of all accrediting agencies or associations which seek recognition by the Secretary in order to determine whether such accrediting agencies or associations meet the criteria established by this section. The Secretary shall conduct an independent evaluation of the information provided by such agency or association. Such evaluation shall include--

(A) the solicitation of third-party information concerning the performance of the accrediting agency or association; and

(B) site visits, including unannounced site visits as appropriate, at accrediting agencies and associations, and, at the Secretary's discretion, at representative member institutions.

(2) The Secretary shall place a priority for review of accrediting agencies or associations on those agencies or associations that accredit institutions of higher education that participate most extensively in the programs authorized by this title and on those agencies or associations which have been the subject of the most complaints or legal actions.

(3) The Secretary shall consider all available relevant information concerning the compliance of the accrediting agency or association with the criteria provided for in this section, including any complaints or legal actions against such agency or association. In cases where deficiencies in the performance of an accreditation agency or association with respect to the requirements of this section are noted, the Secretary shall take these deficiencies into account in the recognition process. The Secretary shall not, under any circumstances, base decisions on the recognition or denial of recognition of accreditation agencies or associations on criteria other than those contained in this section. When the Secretary decides to recognize an accrediting agency or association, the Secretary shall determine the agency or association's scope of recognition. If the agency or association reviews institutions offering distance education courses or programs and the Secretary determines that the agency or association meets the requirements of this section, then the agency shall be recognized and the scope of recognition shall include accreditation of institutions offering distance education courses or programs.

(4) The Secretary shall maintain sufficient documentation to support the conclusions reached in the recognition process, and, if the Secretary does not recognize any accreditation agency or association, shall make publicly available the reason for denying recognition, including reference to the specific criteria under this section which have not been fulfilled.

(o) Regulations. The Secretary shall by regulation provide procedures for the recognition of accrediting agencies or associations and for the appeal of the Secretary's decisions.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Rule 9. Pleading Special Matters

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) Time and Place. For the purpose of testing the sufficiency of a

pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may

be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.
The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statements of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Rule 58. Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon the direction of the court, and these directions shall not be given as a matter of course.

REGULATIONS
DEPARTMENT OF EDUCATION

PART 602--THE SECRETARY'S RECOGNITION OF ACCREDITING AGENCIES

Subpart A--General

Sec. 602.1 Why does the Secretary recognize accrediting agencies?

(a) The Secretary recognizes accrediting agencies to ensure that these agencies are, for the purposes of the Higher Education Act of 1965, as amended (HEA), or for other Federal purposes, reliable authorities regarding the quality of education or training offered by the institutions or programs they accredit.

(b) The Secretary lists an agency as a nationally recognized accrediting agency if the agency meets the criteria for recognition listed in subpart B of this part.

Sec. 602.3 What definitions apply to this part?

The following definitions apply to this part:

Accreditation means the status of public recognition that an accrediting agency grants to an educational institution or program that meets the agency's standards and requirements.

Accrediting agency or agency means a legal entity, or that part of a legal entity, that conducts accrediting activities through voluntary, non-Federal peer review and makes decisions

concerning the accreditation or preaccredidation status of institutions, programs, or both.

Act means the Higher Education Act of 1965, as amended.

Adverse **accrediting** action or adverse action means the denial, withdrawal, suspension, revocation, or termination of accreditation or preaccredidation, or any comparable accrediting action an agency may take against an institution or program.

Advisory Committee means the National Advisory Committee on Institutional Quality and Integrity.

Branch campus means a location of an institution that meets the definition of branch campus in 34 CFR 600.2.

Distance education means an educational process that is characterized by the separation, in time or place, between instructor and student. The term includes courses offered principally through the use of--

(1) Television, audio, or computer transmission, such as open broadcast, closed circuit, cable, microwave, or satellite transmission;

(2) Audio or computer conferencing;

(3) Video cassettes or disks; or

(4) Correspondence.

Final accrediting action means a final determination by an accrediting agency regarding the accreditation or preaccredidation status of an institution or program. A final accrediting action is not appealable within the agency.

Institution of higher education or institution means an educational institution that qualifies, or may qualify, as an eligible institution under 34 CFR part 600.

Institutional accrediting agency means an agency that accredits institutions of higher education.

Nationally recognized accrediting agency, nationally recognized agency, or recognized agency means an accrediting agency that the Secretary recognizes under this part.

Preaccreditation means the status of public recognition that an accrediting agency grants to an institution or program for a limited period of time that signifies the agency has determined that the institution or program is progressing towards accreditation and is likely to attain accreditation before the expiration of that limited period of time.

Program means a postsecondary educational program offered by an institution of higher education that leads to an academic or professional degree, certificate, or other recognized educational credential.

Programmatic accrediting agency means an agency that accredits specific educational programs that prepare students for entry into a profession, occupation, or vocation.

Representative of the public means a person who is not:

(1) An employee, member of the governing board, owner, or shareholder of, or consultant to, an institution or program that either is accredited or preaccredited by the agency or has applied for accreditation or preaccreditation;

(2) A member of any trade association or membership organization related to, affiliated with, or associated with the agency; or

(3) A spouse, parent, child, or sibling of an individual identified in paragraph (1) or (2) of this definition.

Scope of recognition or scope means the range of accrediting activities for which the Secretary recognizes an agency. The Secretary may place a limitation on the scope of an agency's recognition for Title IV, HEA purposes. The Secretary's designation of scope defines the
recognition granted according to:

(1) Geographic area of accrediting activities;

(2) Types of degrees and certificates covered;

(3) Types of institutions and programs covered;

(4) Types of preaccreditation status covered, if any; and

(5) Coverage of accrediting activities related to distance education, if any.

Secretary means the Secretary of the U.S. Department of Education or any official or employee of the Department acting for the Secretary under a delegation of authority.

Senior Department official means the senior official in the U.S. Department of Education who reports directly to the Secretary regarding accrediting agency recognition.

State means a State of the Union, American Samoa, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands,

the Federated States of Micronesia, and the Republic of Palau. The latter three are also known as the Freely Associated States.

Teach-out agreement means a written agreement between institutions that provides for the equitable treatment of students if one of those institutions stops offering an educational program before all students
enrolled in that program have completed the program.

Subpart B--The Criteria for Recognition

Basic Eligibility Requirements

Sec. 602.10 Link to Federal programs.

The agency must demonstrate that:

(a) If the agency accredits institutions of higher education, its accreditation is a required element in enabling at least one of those institutions to establish eligibility to participate in HEA programs; or

(b) If the agency accredits institutions of higher education or higher education programs, or both, its accreditation is a required element in enabling at least one of those entities to establish eligibility to participate in non-HEA Federal programs.

Sec. 602.13 Acceptance of the agency by others.

The agency must demonstrate that its standards, policies, procedures, and decisions to grant or deny accreditation are widely accepted in the United States by--

(a) Educators and educational institutions; and

(b) Licensing bodies, practitioners, and employers in the professional or vocational fields for which the educational institutions or programs within the agency's jurisdiction prepare their students.

Sec. 602.14 Purpose and organization.

(a) The Secretary recognizes only the following four categories of agencies:

(1) An accrediting agency....

(i) Has a voluntary membership of institutions of higher education;

(ii) Has as a principal purpose the accrediting of institutions of higher education and that accreditation is a required element in enabling those institutions to participate in HEA programs; and

(iii) Satisfies the ``separate and independent'' requirements in paragraph (b) of this section.

(2) An accrediting agency....

(i) Has a voluntary membership; and

(ii) Has as its principal purpose the accrediting of higher education programs, or higher education programs and institutions of higher education and that accreditation is a required element in enabling those entities to participate in non-HEA Federal programs.

(3) An accrediting agency.... for purposes of determining eligibility for Title IV, HEA programs--

(i) Either has a voluntary membership of individuals participating in a profession or has as its principal purpose the accrediting of programs within institutions that are accredited by a nationally recognized accrediting agency; and

(ii) Either satisfies the ``separate and independent'' requirements in paragraph (b) of this section or obtains a waiver of those requirements under paragraphs (d) and (e) of this section.

(4) A State agency.....

(i) Has as a principal purpose the accrediting of institutions of higher education, higher education programs, or both; and

(ii) The Secretary listed as a nationally recognized accrediting agency on or before October 1, 1991 and has recognized continuously since that date.

(b) For purposes of this section, the term separate and independent means that:

(1) The members of the agency's decision-making body--who decide the accreditation or preaccreditation status of institutions or programs, establish the agency's accreditation policies, or both--are not elected or selected by the board or chief executive officer of any related, associated, or affiliated trade association or membership organization;

(2) At least one member of the agency's decision-making body is a representative of the public, and at least one-seventh of that body consists of representatives of the public;

(3) The agency has established and implemented guide lines for each member of the decision-making body to avoid conflicts of interest in making decisions;

(4) The agency's dues are paid separately from any dues paid to any related, associated, or affiliated trade association or membership organization; and

(5) The agency develops and determines its own budget, with no review by or consultation with any other entity or organization.

(c) The Secretary considers that any joint use of personnel, services, equipment, or facilities by an agency and a related, associated, or affiliated trade association or membership organization does not violate the ``separate and independent'' requirements in paragraph (b) of this section if--

(1) The agency pays the fair market value for its proportionate share of the joint use; and

(2) The joint use does not compromise the independence and confidentiality of the accreditation process.

(d) For purposes of paragraph (a)(3) of this section, the Secretary may waive the ``separate and independent'' requirements in paragraph (b) of this section if the agency demonstrates that--

(1) The Secretary listed the agency as a nationally recognized agency on or before October 1, 1991 and has recognized it continuously since that date;

(2) The related, associated, or affiliated trade association or membership organization plays no role in making or ratifying either the
accrediting or policy decisions of the agency;

(3) The agency has sufficient budgetary and administrative autonomy to carry out its accrediting functions independently; and

(4) The agency provides to the related, associated, or affiliated trade association or membership organization only information it makes available to the public.

(e) An agency seeking a waiver of the ``separate and independent'' requirements under paragraph (d) of this section must apply for the waiver each time the agency seeks recognition or continued recognition.

Sec. 602.15 Administrative and fiscal responsibilities.

The agency must have the administrative and fiscal capability to carry out its accreditation activities in light of its requested scope of recognition. The agency meets this requirement if the agency demonstrates that--

(a) The agency has--

(1) Adequate administrative staff and financial resources to carry out its accrediting responsibilities;

(2) Competent and knowledgeable individuals, qualified by education and experience in their own right and trained by the agency on
standards, policies, and procedures, to conduct its on-site evaluations, establish its policies, and make its accrediting and preaccrediting decisions;

(3) Academic and administrative personnel on its evaluation, policy, and decision-making bodies, if the agency accredits institutions;
(4) Educators and practitioners on its evaluation, policy, and decision-making bodies, if the agency accredits programs or single-purpose institutions that prepare students for a specific profession;
(5) Representatives of the public on all decision-making bodies; and
(6) Clear and effective controls against conflicts of interest, or the appearance of conflicts of interest, by the agency's--
(i) Board members;
(ii) Commissioners;
(iii) Evaluation team members;
(iv) Consultants;
(v) Administrative staff; and
(vi) Other agency representatives; and

(b) The agency maintains complete and accurate records of--
(1) Its last two full accreditation or preaccreditation reviews of each institution or program, including on-site evaluation team reports, the institution's or program's responses to on-site reports, periodic review reports, any reports of special reviews conducted by the agency between regular reviews, and a copy of the institution's or program's most recent self-study; and
(2) All decisions regarding the accreditation and preaccreditation of any institution or program, including all correspondence that is significantly related to those decisions.

Sec. 602.25 Due process.

The agency must demonstrate that the procedures it uses throughout the accrediting process satisfy due process. The agency meets this requirement if the agency does the following:

(a) The agency uses procedures that afford an institution or program a reasonable period of time to comply with the agency's requests for information and documents.

(b) The agency notifies the institution or program in writing of any adverse accrediting action or an action to place the institution or program on probation or show cause. The notice describes the basis for
the action.

(c) The agency permits the institution or program the opportunity to appeal an adverse action and the right to be represented by counsel during that appeal. If the agency allows institutions or programs the right to appeal other types of actions, the agency has the discretion to
limit the appeal to a written appeal.

(d) The agency notifies the institution or program in writing of the result of its appeal and the basis for that result.

Review by the National Advisory Committee on Institutional Quality and Integrity

Sec. 602.32 What is the role of the Advisory Committee and the senior Department official in the review of an agency's application?

(a) The Advisory Committee considers an agency's application for recognition at a public meeting and invites Department staff, the agency, and other interested parties to make oral presentations at the meeting. A transcript is made of each Advisory Committee meeting.

(b) When it concludes its review, the Advisory Committee recommends that the Secretary either approve or deny recognition or that the Secretary defer a decision on the agency's application for recognition.

(1)(i) The Advisory Committee recommends approval of recognition if the agency complies with the criteria for recognition listed in subpart
B of this part and if the agency is effective in its performance with respect to those criteria.

(ii) If the Advisory Committee recommends approval, the Advisory Committee also recommends a recognition period and a scope of
recognition.

(iii) If the recommended scope or period of recognition is less than that requested by the agency, the Advisory Committee explains its
reasons for recommending the lesser scope or recognition period.

(2)(i) If the agency fails to comply with the criteria for recognition in subpart B of this part, or if the agency is not effective in its performance with respect to those criteria, the Advisory Committee recommends denial of recognition, unless the Advisory Committee concludes that a deferral under paragraph (b)(3) of this section is warranted.

(ii) If the Advisory Committee recommends denial, the Advisory Committee specifies the reasons for its recommendation, including all
criteria the agency fails to meet and all areas in which the agency fails to perform effectively.

(3)(i) The Advisory Committee may recommend deferral of a decision on recognition if it concludes that the agency's deficiencies do not
warrant immediate loss of recognition and if it concludes that the agency will demonstrate or achieve compliance with the criteria for
recognition and effective performance with respect to those criteria before the expiration of the deferral period.

(ii) In its deferral recommendation, the Advisory Committee states the bases for its conclusions, specifies any criteria for recognition the agency fails to meet, and identifies any areas in which the agency fails to perform effectively with respect to the criteria.

(iii) The Advisory Committee also recommends a deferral period, which may not exceed 12 months, either as a single deferral period or in
combination with any expiring deferral period in which similar deficiencies in compliance or performance were cited by the Secretary

(c) At the conclusion of its meeting, the Advisory Committee forwards its recommendations to the Secretary through the senior Department official.

(d) For any Advisory Committee recommendation not appealed under Sec. 602.33, the senior Department official includes with the Advisory Committee materials forwarded to the Secretary a memorandum containing the senior Department official's recommendations regarding the actions proposed by the Advisory Committee.

Sec. 602.33 How may an agency appeal a recommendation of the Advisory Committee?

(a) Either the agency or the senior Department official may appeal the Advisory Committee's recommendation. If a party wishes to appeal, that party must--

(1) Notify the Secretary and the other party in writing of its intent to appeal the recommendation no later than 10 days after the Advisory Committee meeting;

(2) Submit its appeal in writing to the Secretary no later than 30 days after the Advisory Committee meeting; and

(3) Provide the other party with a copy of the appeal at the same time it submits the appeal to the Secretary.

(b) The non-appealing party may file a written response to the appeal. If that party wishes to do so, it must--

(1) Submit its response to the Secretary no later than 30 days after receiving its copy of the appeal; and

(2) Provide the appealing party with a copy of its response at the same time it submits its response to the Secretary.

(c) Neither the agency nor the senior Department official may include any new evidence in its submission; i.e., evidence it did not previously submit to the Advisory Committee.

Review and Decision by the Secretary

Sec. 602.34 What does the Secretary consider when making a recognition decision?

The Secretary makes the decision regarding recognition of an agency based on the entire record of the agency's application, including the following:

(a) The Advisory Committee's recommendation.
(b) The senior Department official's recommendation, if any.
(c) The agency's application and supporting documentation.
(d) The Department staff analysis of the agency.
(e) All written third-party comments forwarded by Department staff to the Advisory Committee for consideration at the meeting.
(f) Any agency response to the Department staff analysis and third-party comments.
(g) Any addendum to the Department staff analysis.
(h) All oral presentations at the Advisory Committee meeting.
(i) Any materials submitted by the parties, within the established timeframes, in an appeal taken in accordance with Sec. 602.33.

Sec. 602.36 May an agency appeal the Secretary's final recognition decision?

An agency may appeal the Secretary's decision under this part in the Federal courts as a final decision in accordance with applicable Federal law.

Appeal Rights and Procedures

Sec. 602.44 How may an agency appeal the subcommittee's recommendation?

(a) Either the agency or the senior Department official may appeal the subcommittee's recommendation. If a party wishes to appeal, that party must--

(1) Notify the Secretary and the other party in writing of its intent to appeal the recommendation no later than 10 days after receipt of the recommendation;
(2) Submit its appeal to the Secretary in writing no later than 30 days after receipt of the recommendation; and
(3) Provide the other party with a copy of the appeal at the same time it submits the appeal to the Secretary.

(b) The non-appealing party may file a written response to the appeal. If that party wishes to do so, it must--

(1) Submit its response to the Secretary no later than 30 days after receiving its copy of the appeal; and

(2) Provide the appealing party with a copy of its response at the same time it submits its response to the Secretary.

(c) Neither the agency nor the senior Department official may include any new evidence in its submission, i.e., evidence it did not previously submit to the subcommittee.

(d) If the subcommittee's recommendation is appealed, the Secretary renders a final decision after taking into account that recommendation and the parties' written submissions on appeal, as well as the entire record before the subcommittee and the subcommittee's opinion.

Sec. 602.45 May an agency appeal the Secretary's final decision to limit, suspend, or terminate its recognition?

An agency may appeal the Secretary's final decision limiting, suspending, or terminating its recognition to the Federal courts as a final decision in accordance with applicable Federal law.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GARY H. PALM,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case Number: 1:01CV00439**
	)	
RODERICK R. PAIGE, SECRETARY OF EDUCATION,	)	**Judge Ellen Segal Huvelle**
	)	
	)	
	)	
Defendants.	)	

COMPLAINT

INTRODUCTORY STATEMENT

This case seeks a declaratory judgment that the "separate and independent" Department of Education ("the DOE") regulations violate the Higher Education Act and its amendments (cite) ("the Act"). The regulations at issue have been applied contrary to the Higher Education Act to require the American Bar Association ("the ABA") to restructure its governance structure to preclude its House of Delegates from taking the final, determinative action on law school accreditation policies and approval of law schools. DOE has

also applied its regulations beyond DOE's limited regulatory authority under the Act. DOE requires the ABA to meet the "separate and independent" requirements even when reviewing approximately 160 law schools for their graduates to sit for the bar but which already have accreditation for federal purposes to obtain federal financial assistance. Only 18 independent law schools use ABA accreditation to obtain student assistance under DOE programs. Even those schools could receive federal accreditation from other agencies, but choose not to do so. DOE is applying its regulations overly broadly beyond its limited statutory authority so that its requirements apply to all of the ABA's accreditation activities even though nearly all schools already have accreditation for federal purposes and do not need such accreditation.

PARTIES

1. Plaintiff is a member of the ABA, and was a professor until June 30, 2000 at an ABA accredited law school, the University of Chicago Law School.

2. Plaintiff served for seven (7) years as a member of the ABA Accreditation Committee and thereafter for six (6) years on the Council of the ABA's Section of Legal Education and Admissions to the Bar until July 2000. All service was pro bono as a volunteer.

3. Plaintiff served as Chair of the Illinois State Bar Association's ("the ISBA") Committee on Legal Education, Admissions and Competence which developed several proposals to revise the accreditation standards of the ABA. These proposals were approved by the ISBA's Board of Governors and were presented to the ABA's House of Delegates by the then ISBA President, Tom Leahy, after the Council of the ABA's Section of Legal Education and Admissions to the Bar refused to recommend the proposed changes.

4. In one instance the ABA's House of Delegates approved a change in accreditation standards to require that each school offer clinical opportunities for its students over the adverse recommendation of the Council.

5. With the changes made by the ABA in its governance structure to satisfy the DOE's "separate and independent" requirements, the ISBA is no longer permitted to ask the House of Delegates to adopt accreditation standards rejected by the Council.

6. Defendant is the Secretary of the United States Department of Education and recognizes accrediting agencies under The Higher Education Act, as amended.

Federal Question Jurisdiction Question

7. Jurisdiction is conferred by 28 U.S.C. § 1331.

8. DOE required the ABA to eliminate the role of the House of Delegates to make final accreditation decisions. No appeal is available for ABA members and for dissenting leaders of the ABA to appeal within DOE and then seek review in Federal Court.

9. Since 1952, the ABA has been recognized as an accrediting body by the DOE for institutions of higher education specifically independent, free-standing law schools which are not part of a University.

10. The ABA received legal advice that the DOE's regulations imposing on the ABA the "separate and independent" requirements and precluding a waiver of those provisions for the ABA are contrary to the Higher Education Act, are invalid and cannot be lawfully enforced against the ABA. Nevertheless the ABA majority leadership did not appeal within DOE's administrative appeal process nor was judicial review sought.

11. The ABA majority leadership met privately with DOE staff and reached an agreement that

eliminated the role of the House of Delegates as the final decision maker on accreditation policies, standards and the provisional and full accreditation of individual law school. DOE staff refused to meet with plaintiff and other dissenting leaders who wanted to present alternative proposals for consideration by DOE that would keep the House of Delegates' determinative role in accreditation matters and still remain in compliance with the Consent Decree.

CONSENT DECREE IN *USA v. ABA*

12. In the early 1990's, the ABA was charged by the Department of Justice with a variety of anti-trust violations which resulted in a consent decree.

13. In *United States of America v. American Bar Association*, 95-1211 (CR), the United States Department of Justice sued the ABA on the ground that the law school accreditation process had been captured by legal educators who had a direct interest in the outcome of the process. The ABA agreed to a consent decree that required the ABA to abandon its prior practices and to require more participation in and oversight of the accreditation process by representatives of the judiciary and the practicing bar, including the House of Delegates.

DOE APPROVED THE CONSENT DECREE AS BEING IN COMPLIANCE WITH THE "SEPARATE AND INDEPENDENT" REQUIREMENTS.

14. The proposed consent decree was reviewed by DOE to determine if its terms were in compliance with the Higher Education Act and DOE's regulations. DOE objected to those provisions which brought the ABA's Board of Governors into the accreditation process and gave the Board of Governors authority to approve certain appointments to the accrediting body. Changes were made in the Consent Decree to satisfy DOE's objections before the Consent Decree was signed and approved by the federal judge. DOE approved the rest of the terms of the Consent Decree

as being in compliance with the Higher Education Act and DOE's Regulations specifically referring to the "separate and independent" requirements.

15. Two years later, DOE, claiming that its staff realized for the first time since 1952 that the ABA's House of Delegates was the final decision maker for accrediting law schools and adopting accreditation policies, ruled that the role of the House of Delegates in accreditation matters, violated its "separate and independent" regulations.

16. The ABA objected to the DOE's change of position.

17. The DOE threatened the ABA that any other actions than adopting the specific terms agreed to by the ABA and DOE would result in the withdrawal of approval of the ABA as an accrediting body and jeopardize the accreditation of the free-standing, independent law schools. The Secretary of DOE sent a letter to this effect to the ABA that was circulated to the House of Delegates.

18. The ABA unilaterally made the changes without moving to modify the Consent Decree or even informing the Court. Two years later the Department of Justice decided that a modification of the Consent Decree was necessary and should not be made through on-going, unilateral non-compliance and filed a joint motion to modify with the ABA.

19. In the proceedings to modify the Consent Decree, the ABA and the Department of Justice argued that the ABA was required to make the change in the role of the House of Delegates in accreditation governance by the DOE's application of the "separate and independent" requirements in its regulations. Therefore, they argued that the ABA should be excused from its violation of the Consent Decree and the Consent Decree should be modified to explicitly permit the elimination of the decisional role of the House of Delegates to become part of the Consent Decree.

20. The Consent Decree limited the number of faculty members and law school personnel on its accrediting body, the Council of the Section of Legal Education and Admissions to the Bar to no more than 50 percent. The purpose was to increase the role of judges and the practicing bar to break up the capture of the process by the academics and deans of the law schools. DOE's "separate and independent" requirements have further diluted this effect because DOE requires three "public members" to be on the Council. DOE defines public members to exclude judges and lawyers who are members of the ABA. Also, the ABA counts judges and lawyers who have been full time faculty members or deans in their non-faculty count. The result is a continuing diminishment in the Consent Decree's impact on breaking up the capture by the academics and deans.

21. Plaintiff filed comments in that modification proceeding in *USA v.* ABA, 95-1221, raising objections that the DOE regulations violate the Act and are invalid.

22. The Department of Justice took the position in the modification proceeding in *USA v.* ABA, 95-1221 that the Court must accept the validity of the DOE regulations and cannot rule on their validity. The Department of Justice further asserted that Plaintiff can file a separate federal action to challenge the validity of the DOE regulations. Therefore, Plaintiff has brought this action to obtain a ruling on the validity of the DOE regulations as applied to the ABA since the Court approved the agreed upon modification.

23. The ABA officers improperly applied the ABA rules and procedures to impair the ability of House of Delegates members under the ABA Constitution to fairly decide whether to relinquish its decisional role. The ABA officers circulated a letter from the Secretary of Education indicating that the ABA would lose DOE recognition for accrediting law schools if the agreed upon changes were not approved. The improper methods used by the ABA leadership include:

i. By using a simple change in ABA rules rather that an amendment to the ABA Constitution to divest the House of

Delegates of its decision-making authority with respect to the approval of accreditation standards and accredited schools, the ABA officers violated Illinois Not-for-Profit Corporation law.

ii. Without notice to the House of Delegates that a super majority was required even for the proposed rule change, the vote and debate on the proposed rule changes were conducted on the assumption that only a simple majority was required.

iii. By allowing ABA accredited law schools to pay for discounted ABA and Section of Legal Education membership fees for their faculty members and deans under the Faculty Group Membership Program, ABA officers have enabled legal academics to exercise disproportionate influence on accreditation decision-making by holding approximately 90% of the voting membership that elects the Council of the Section, which performs the accreditation functions.

24. The elimination of the House of Delegates' decision-making authority on accreditation matters violates the ABA's Constitution's guarantee that the House of Delegates "supervise and direct" the actions of ABA sections and committees, and therefore violate the Illinois Not-for-Profit Corporation Act.

25. The General Counsel of the ABA has publicly recognized the unconstitutionality under Illinois law of its divestment of the House of Delegates' decision-making role and has testified: "Let us just say, for example, the role that the House of Delegates plays in the accreditation process is captured within our constitution and bylaws. So that, if, for example, in order to comply with separate and independent, we wanted to excise the role of the House from the process, that would require an amendment to our constitution and bylaws." Tr. at p. 60 (emphasis added).

26. The changes in the governance structure required by the DOE violate Illinois' Not-for-Profit Corporation Law under which the ABA is incorporated by setting up an independent subsidiary that is not responsible to either the House of Delegates or the Board of Governors.

27. The ABA officers' aforesaid conduct in bypassing constitutional procedures in order to eliminate the House of Delegate's decision-making role in accreditation matters is an attempt to negate the increased influence of the practicing bar required by the consent decree and to prevent the House of Delegates from continuing in its prior role of assuring that the accreditation process pays sufficient attention to the interests of law students, the bar and the public in requiring schools to prepare students for the competent and ethical practice of law.

COUNT I

THE DOE REGULATIONS ARE INVALID BECAUSE THE ACT DOES NOT REQUIRE THAT ORGANIZATIONS, LIKE THE ABA, MUST MEET THE SEPARATE AND INDEPENDENT REQUIREMENTS.

28. Congress required no more than that any membership organizations composed of institutions of higher education must set up separate and independent

accrediting bodies. Other membership organizations (not composed of institutions of higher education) can set up accrediting bodies that are not separate and independent of the organization. The only language in 20 USCS Section 1099(b)(2000) that imposes any "separate and independent" requirement is contained in subparagraph (A) of Paragraph 3 which requires that:

(3) "If such agency or association is an association described in—(A) subparagraph (A)(i) of Paragraph (2), then such agency or association is separate and independent both administratively and financially of any related, association or affiliated trade association or membership organization;" 20 USCS § 1099(b)(a)(3)(A)(2000).

29. The only "agency or association" referred to in subparagraph (A)(i) of Paragraph (2) is an agency or association that "has a voluntary membership of institutions of higher education and had as a principal purpose the accrediting of institutions of higher education." 20 USCS §1099b(a)(2) (A)(i)(2000)(emphasis added). Neither the ABA nor the Council is included under this provision.

30. There is no other provision in the statute that imposes a "separate and independent" requirement for membership organizations of individuals participating in a profession, a trade association or any "voluntary membership" organization other than one that has a voluntary membership of institutions of higher education. The "separate and independent requirement" by the words of the statute applies only to subparagraph (A)(i) and not to subparagraph (A)(ii) nor subparagraph (C).

31. DOE asserts that the ABA is an accreditation agency or association approved under 1099b(a)(2)(C)(i). U.S.C. 1099b (C) provides:

"(C) is an agency or association that, for the purposes of determining eligibility for student

assistance under this title, conducts accreditation through (i) a voluntary membership organization of individuals participating in a profession. . . ."

32. In *USA v.* ABA, DOE has taken the position that the "separate and independent" requirement applies to (a)(2)(C)(i) accrediting bodies, like the ABA, by implication from the waiver provisions contained in 1099b(a)(3)(C). 1099b(a)(3)(C) provides:

(3) If such agency or association is an agency or association described in . . .

(C) subparagraph (C) of paragraph (2) and such agency or association has been recognized by the Secretary on or before October 1, 1991, then the Secretary may waive the requirement that such agency or association is separate and independent, both administratively and financially of any related, associated, or affiliated trade association or membership organization upon a demonstration that the existing relationship has not served to compromise the independence of its accreditation process."

33. DOE recognizes that the Act does not specifically impose the "separate and independent" requirement in 20 USCS Section 1099(b)(2000). But DOE's position is that the waiver provided for the "separate and independent" requirement would be meaningless otherwise and therefore must create an additional requirement of "separate and independent" status for organizations under (a)(2)(C)(i), like the ABA. On its face, the provision simply allows waivers should such agencies be required to meet the "separate and independent" requirements. The 1993 amendments eliminated that requirement for the ABA and other similar organizations.

34. Legislative history shows that the Higher Education Act of 1992 required the ABA to meet the "separate and independent" requirements, but was

amended in 1993 to eliminate this requirement for organizations other than membership organizations composed of institutions of higher education, so that it does not cover the ABA. Congress addressed this issue directly in 1993 when it passed the Technical Amendments Act of 1993 to correct and clarify that the "separate and independent" requirement applies only to associations and agencies composed of higher education institutions.

35. As originally enacted in 1992 the Higher Education Act required all membership organizations of every kind, including the ABA, that accredit institutions of higher education to meet the "separate and independent" requirements. As originally enacted in 1992, 20 U.S.C. §§1099(b)(a)(2)(A)(i)(1992) provided:

> "Such standards shall require that . . .
>
> (2) Such agency or association . . .
>
> (a)(i) for the purpose of participation in programs under this Act, has a voluntary membership and has a principal purpose the accrediting of institutions of higher education;
>
> (ii) for the purpose of participation in other programs administered by the Department of Education or other Federal agencies, has a voluntary membership and has as its principal purpose the accrediting of institutions of higher education or programs;
>
> (3) If such an agency or association is an agency or association described in . . .
>
> (A) subparagraph (2) then such agency or association is separate and independent, both administratively and financially of any related associated or affiliated trade association or membership organization."

36. The 1993 Amendments greatly limited the application of the "separate and independent" requirement by making two changes. The first change was to modify the words "voluntary membership" in (a)(2)(A)(i) so it now reads:

> (2) Such agency or association
>
> (A)(i) for the purpose of participation in programs under this Act, has a voluntary membership of institutions of higher education . . . . 20 USCS §1099b (2000)

37. The second change was made in 1099b(a)(3)(A) by changing the paragraph references to limit the separate and independent requirement to only agencies or associations described in (A)(i) of paragraph (2) which, as amended applies only to agencies or associations with a "voluntary membership of institutions of higher education . . . ."

38. After the 1993 amendments, the ABA is no longer included under (A)(i) and is no longer required to meet the "separate and independent" requirements.

39. DOE did not change its regulations in any way with respect to the changes in the "separate and independent" requirements made by the 1993 Act.

40. Subparagraph (A)(ii) of paragraph (2) of §1099(b) includes all other agencies or associations that have a voluntary membership and have as their principal purpose the accrediting of institutions of higher education or programs but does not by its terms contain the "separate and independent" requirement. Nor does subparagraph (a)(2)(C) explicitly require that the ABA meet the "separate and independent" requirement.

41. The Secretary's regulations are arbitrary and in conflict with the statute and are therefore invalid.

DOE EXCEEDS ITS AUTHORITY BY IMPOSING ITS REQUIREMENTS ON OTHER ACA ACCREDITATION ACTIVITIES THAT DO NOT RELATE TO FEDERAL PURPOSES.

42. The Secretary has violated his authority by imposing the "separate and independent" requirements on the ABA's accrediting activities other than those necessary to enable law schools to establish eligibility for programs administered by the Department of Education. The Secretary has required the ABA to meet the "separate and independent" requirements for its approval of the approximately 160 law schools to allow their students to sit for the bar in the 50 states but that obtain accreditation for federal financial assistance through the accreditation of their parent University by another accrediting body and are therefore already accredited for DOE purposes.

43. This overbroad and excessive application of authority by DOE violates 1099b(m) which provides that "(m) Limitation of the Secretary's authority. The Secretary may only recognize accrediting agencies or associations which accredit institutions of higher education for the purpose of enabling such institutions to establish eligibility to participate in the programs under this Act or which accredit institutions of higher education or higher education programs for the purpose of enabling them to establish eligibility to participate in other programs administered by the Department of Education or other Federal agencies."

44. The only statutory provisions which define the types of agencies and governance structures required begin with limitations on the application of the definitions to "for the purposes of participation in programs under this Act," . . . 1099(b)(a)(2)(A)(i); for the purpose of participation in other programs administered by the Department of Education or other Federal agencies" . . . 1099(b)(2)(A)(ii); and (C) is an agency or association that, for the purpose of determining eligibility for student assistance under this title, conducts accreditation through .

. . 1099b(a)(2)(C). DOE's application of its regulations to all of the ABA's accreditation activities violates these limitations on DOE's authority.

DOE'S CLAIM IS INCREDIBLE THAT ITS STAFF SUDDENLY REALIZED, AFTER 45 YEARS OF APPROVING THE ABA, THAT THE ABA'S HOUSE OF DELEGATES MAKES THE FINAL DECISION ON ACCREDITATION MATTERS.

45. DOE represented to the Court prior to entry of the Consent Decree that the ABA's structure under the Final Consent Decree complied with the "separate and independent" regulations. The regulations have not changed in any material regard. DOE was bound by this representation. The House of Delegates was the final decision-maker when DOE gave its representation in *U.S.A. v. ABA*. DOE's claimed mistake of fact about the role of the House of Delegates is arbitrary and capricious and invalid.

DOE HAS VIOLATED §1099b(g) OF THE HIGHER EDUCATION ACT BY ADDING CRITERIA FOR APPROVAL OF ACCREDITING BODIES BEYOND THOSE SPECIFIED BY THE ACT.

46. By its regulations, DOE has added criteria beyond those provided by Congress and violates 1099b(g) which specifically precludes the DOE from adding any criteria for accrediting bodies to meet in order to be approved. "Nothing in this Act shall be construed to permit the Secretary to establish criteria for accrediting agencies or associations that are not required by this section. Nothing in this Act shall be construed to prohibit or limit any accrediting agency or association from adopting standards not provided for in this Section." The "separate and independent" regulations violate this provision of the statute as applied to the ABA.

COUNT II

THE REGULATIONS SETTING THE TERMS FOR A WAIVER OF THE SEPARATE AND INDEPENDENT REQUIREMENTS ALSO VIOLATE THE HIGHER EDUCATION ACT.

In the alternative, the Regulations setting forth the requirements for obtaining a waiver of the separate and independent requirements are invalid because they conflict with the statute.

47. §1099b(a)(3)(C) provides " . . . and such agency or association has been recognized by the Secretary on or before October 1, 1991, then the Secretary may waive the requirement that such agency or association is separate and independent both administratively and financially of any related associated or affiliated trade association or membership organization upon a demonstration that the existing relationship has not served to compromise the independence of its accreditation process." Emphasis added.

48. The statute's waiver provision for the separate and independent requirement examines prior practice of the accrediting agency and asks whether accreditation functions had been performed effectively to show that the independence of the accrediting body has not been compromised. The regulations are to the contrary, prospective only and look only to the structure of the organization and not past performance. The waiver regulations do not address prior experience but require additional structural, administrative arrangements. The waiver requirements violate the Act in the "separate and independent" statutory definition. The provisions conflict with the waiver provisions in the statute and are invalid.

49. The Higher Education Act, as amended, defines "separate and independent" as follows:

"(b) Separate and independent defined. For the purpose of subsection (a)(3), the term "separate and independent" means that—

(1) the members of the postsecondary education governing body of the accrediting agency or association are not elected or selected by the board or chief executive officer of any related, associated, or affiliated trade association or membership organization;

(2) among the membership of the board of the accrediting agency or association there shall be one public member (who is not a member of any related trade or membership organization) for each six members of the board, with a minimum of one such public member, and guidelines are established for such members to avoid conflicts of interest;

(3) dues to the accrediting agency or association are paid separately from any dues paid to any related, associated, or affiliated trade association or membership organization; and

(4) the budget of the accrediting agency or association is developed and determined by the accrediting agency or association without review or resort to consultation with any other entity or organization.

50. The DOE Regulations redefine the waiver provisions to reimpose similar requirements to those that are supposed to be waived.

(d) For purposes of paragraph (1)(3) of this section, the Secretary may waive the separate and independent requirements in paragraph (b) of this section if the agency demonstrates that—

(1) The Secretary listed the agency as a nationally recognized agency on or before October 1, 1991 and has recognized it continuously since that date.

(2) The related, associated, or affiliated trade association or membership organization plays no role in making or ratifying either the accrediting or policy decisions of the agency;

(3) The agency has sufficient budgetary and administrative autonomy to carry out its accrediting functions independently; and

(4) The agency provides to the related, associated, or affiliated trade association or membership organization only information it makes available to the public.

51. DOE granted the ABA's request for a waiver of the "separate and independent" requirements in 1993. But DOE refused to grant the waiver in post 1997 proceedings reviewing the ABA's application for renewed recognition.

52. The Regulations violate the Act by reimposing most of the separate and independent requirements or even more stringent ones on bodies that were intended to be granted a waiver under the statute.

53. The ABA is entitled to a waiver of the "separate and independent" requirements, if they lawfully apply to the ABA, under the terms of the waiver provision in the Higher Education Act so long as the House of Delegates is retained as the final decision maker on law school accreditation policies and actions.

PRAYER

Plaintiff prays for entry of a declaratory judgment

(i) that the Regulations at issue are invalid;

(ii) that the ABA is not bound by the Regulations; and

(iii) that the ABA is free to have the House of Delegates be the final decision maker in accreditation matters, as it was prior to DOE's adverse actions against the ABA.

Respectfully submitted,

_____

Gary H. Palm, Plaintiff

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Dated: February 26, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GARY H. PALM,	)
	)
Plaintiff,	)
	)
v.	)**Civil**
Action No. 1:01CV00439(ESH)	
	)
RODERICK R. PAIGE, SECRETARY OF EDUCATION,	)
	)
Defendants.	)

PLAINTIFF'S MEMORANDUM IN RESPONSE

TO

DEFENDANT'S MOTION TO DISMISS

I. THE GOVERNMENT'S ATTEMPT TO REQUIRE SPECIFIC FACTUAL DETAILS TO ESTABLISH STANDING IS PREMATURE AND MUST AWAIT SUMMARY JUDGMENT OR TRIAL.

Plaintiff has standing under Article III to be heard to argue that Department of Education

regulations eliminating the ABA's House of Delegates as the final decision maker on law school Accreditation matters are invalid. The Government is wrong when it argues that Plaintiff must show specific facts with particularity to show standing at the pleading stage. The Supreme Court has only required general factual statements that can fairly be read to include more specific facts that would show standing. Plaintiff will show those general facts alleged in the complaint and the specifics that are included in some of them. But full detail must await discovery and summary judgment or trial.

In *Friends of the Earth*, even Justice Scalia in his dissenting opinion recognized that:

> **"General allegations of injury may suffice at the pleading**
>
> **stage, but at summary judgment, plaintiffs must set forth "specific facts" to support their claims. 504 U.S. at 561. And where, as here, the cases proceeded to judgment, those specific facts must be supported adequately in the evidence produced at trial." Ibid.**

(Quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115, n.31, (1979).

The *Lujan* case is not to the contrary. It was a summary judgment case and it was recognized by the Supreme Court at the time, that pleadings are sufficient if they raise general factual

matters which carry within them the potential for the specifics to establish standing. *Lucas v. South Carolina Coastal Council*, 505 U. S. 1003, 1014 (1992). Plaintiff's complaint sets out sufficient general facts.

II. THE FACTS ALLEGED CARRY WITHIN THEM SUFFICIENT SPECIFIC FACTUAL POTENTIAL TO ESTABLISH STANDING AT THE PLEADING STAGE.

The use of the American Bar Association as the Accreditation Authority for American Law Schools was designed to provide a direct role for lawyers and judges in the setting of standards for legal education and conducting the review of individual law schools. Over the years since at least 1952 while the House of Delegates has been the final decision maker, active and retired law professors and law deans have nevertheless played a vital function as volunteers on committees and on site teams to visit law schools. Complaint ¶9.

In the 1970's and 1980's criticism grew in many quarters that the ABA was no longer in control and that the influence of the deans and professors had reached the level of effective control and was being exercised unfairly and without regard to educational validity and reliability. If the academic professors and deans wanted to have complete control, they should have applied to be the national law school accrediting body through the Association of American Law Schools or other law school entities like the American Law Deans Association. But had they done so, they would have been challenged as providing questionable oversight since the regulated law schools would have been regulated by representatives of those same law schools. Instead, they relied on the appearance of regulation by a bar association, although in

actuality they controlled the process. Complaint ¶13.

The Justice Department investigated and concluded that the deans and academics had captured actual control of the ABA's accreditation system in violation of the anti-trust laws. Therefore, the Department of Justice began a criminal anti-trust proceeding against the American Bar Association focusing on the "capture" as it was denominated by the Department of Justice of the accreditation process by the "guild" of law school academics. The resulting Consent Decree focused on changing the governance structure to increase the role of the bench and bar and place limits on the number of law professors and deans on accreditation bodies. Initially, the proposed Consent Decree sent out for comments required that the Board of Governors approve all appointments and election of persons

to the Council and the Accreditation Committee. However, that was opposed by the Department of Education as violating its "separate and independent" regulations. Therefore, the Department of Justice and the ABA agreed to eliminate the role of the Board of Governors in approving the persons elected or appointed but retained the caps on the number of academics and deans. Final decision making authority of the House of Delegates on accreditation and oversight supervision of the Council and the Legal Education Section was maintained as provided in the ABA Constitution. Complaint ¶13.

The Department of Education signed off on the revised Consent Decree, as amended, and indicated that the role of the House of Delegates was in compliance with its "separate and independent" regulations. Complaint ¶14. Sometime later, without advising the Court, the

Department of Education changed its opinion and concluded to everyone's amazement that the Consent Decree violated its "separate and independent" regulations. DOE employees claimed that they now realized for the first time in all the years of reviewing the ABA since the 1950's, that the House of Delegates was the final decision making authority. Complaint ¶15. DOE then reinterpreted its regulations' requirement of "separate and independent" status so that the House of Delegates could no longer play its long-standing accreditation role. DOE required the ABA to eliminate the primary safeguard from capture and control by the deans and academics, which was the House of Delegates. Complaint ¶17.

The Department of Education then in a squabble between agencies in the federal government prevailed in imposing its will over the Department of Justice. However the Department

of Justice waited several years before requiring the modification of the Decree, apparently acquiescing in the violation of the Consent Decree without making the ABA or DOE request the modification. Complaint ¶19. Then relying on the extreme judicial deference accorded the Department of Justice in anti-trust consent decree matters, Judge Lamberth approved the Department of Justice's jointly sought modification of the Consent Decree and refused to address Plaintiff's arguments that the DOE's regulations are invalid.

Throughout the process, the Department of Education would not allow anyone other than the ABA and Legal Education Section leadership propose alternative governance arrangements for DOE's consideration to see whether alternatives to the elimination of the House of Delegates' final decision making role would meet the DOE's concern. Complaint ¶11. Contrary to DOE's

regulations, the Higher Education Act amendments had clearly established a grandfathering provision for accrediting bodies approved before 1992 that allowed them to retain their approved status without meeting the "separate and independent" requirements. The "grandfathering" provision looked to whether the independence of the process had been violated in the past. Complaint ¶¶47-53. There certainly was no doubt that the independence of the process had been protected from improper intrusion by the House of Delegates. Indeed, the whole process was so independent that, according to the Department of Justice, it had been illegally captured by the academics and deans.

III. AS A MEMBER OF THE ABA, PLAINTIFF HAS SUFFERRED ACTUAL INJURY AND HAS STANDING.

A. Plaintiff has standing to return accountability by the Council and Legal

Education Section to the ABA to limit the ABA's liability for the actions of the Council and the Section.

Now, after the Department of Justice argued that Plaintiff's proposals could not be addressed by the Department of Education or in the anti trust modification proceeding because he was not an officer or in the majority leadership of the ABA or the Section, and that his concerns should be raised in an Administrative Procedure Act proceeding, the Department of Justice changes its tune and argues that Plaintiff lacks standing. It does so by relying on old cases and does not cite any of the recent Supreme Court cases issued in the late 1990's and 2000.

These recent cases show that Plaintiff has standing because he is a member of the American Bar Association and that as such his voting rights have been diluted. He is also a member of the

ABA's Section on Legal Education and votes on electing the members of the Council. It is this very process which has been captured and which needed correction by the Department of Justice in the Consent Decree because the group membership program allows law schools to pay for ABA and Section memberships of their faculty and administrators. (DOJ relied on this fact, in part, to show the capture in the anti-trust complaint and competitive impact statement.) The result is that the membership in the Section which elects the Council (now the final accreditation decision maker) is made up of over 80 percent law school paid members and less than 20 percent by non-law school dues-paying ABA members.

Another reason to grant standing is that Mr. Palm is still active in other organizations which regularly address accreditation matters with the ABA. He was elected to the Board of

Directors of the Clinical Legal Education Association, ("CLEA") which frequently presents accreditation proposals for the reform of legal education and the improvement of skills training, legal writing, clinical education, professionalism, pro bono and other aspects of legal education directly related to preparing students for the practice of law. The Clinical Legal Education Association is recognized as a sibling organization involved in legal education by the American Bar Association's Council of the Section on Legal Education and, as such, is invited to give regular reports and is permitted to participate in the work of the Council. CLEA has testified on most, if not all, recent matters coming before the Council. CLEA has also appeared before the Department of Education regularly about approval of the ABA, as has Plaintiff.

Mr. Palm also continues as a member of the Legal Education, Admissions and Competence Committee of the Illinois State Bar Association, which has in the past and will again in the future, generate proposals for the reform and improvement of legal education. Since it has several delegates in the House of Delegates and has privileges of the floor, the Illinois State Bar Association has presented many proposals in collaboration with CLEA and other entities both within the American Bar Association and outside concerned about improving legal education in America.

The effectiveness of these groups will be greatly diminished. At least at a minimum their bargaining strength to bring about reforms of legal education through the accreditation process will be greatly reduced. Since the House of Delegates was more inclined to favor changes in

legal education than were the Council or the Section, threats of House of Delegate action were often sufficient to reach compromises. The Illinois State Bar Association always has other matters on its agenda for action by the House of Delegates and is less inclined to take on the leadership of the Section on Legal Education in a floor fight if the result is simply a recommendation that the Legal Education Section can consider and reject. DOE's action has resulted in a drastic change in the bargaining position of the ISBA, CLEA and Plaintiff.

As a Council Member, Plaintiff had the privilege of presenting proposals for changes in accreditation standards and interpretations for consideration by the Council. In the last meeting he attended as a Council member in 2000, Plaintiff presented a proposal based upon an article by Stanford's distinguished Professor and then

President of the Association of American Law Schools, Debra Rohde, that there be some requirement in the accreditation standards for instruction in professionalism issues. That proposal was referred to the Standards Review Committee of the Section on Legal Education and is still pending.

Mr. Palm just met with the Consortium of State Professionalism Centers at the ABA meeting in Chicago in August, 2001. He received encouragement and is re-drafting the professionalism proposal for presentation to the Legal Education Section's Standards Review Committee in late August or early September. The Committee will then presumably address his still pending Council Member initiated proposal during this coming school year. At the Professionalism Consortium Meeting, Mr. Palm was informed that law schools are not proceeding

promptly and effectively in providing pro bono opportunities for students. The current accreditation standard states that each School "should" provide opportunities for pro bono experiences. Accreditation Standard 302(e) data collected by the Association of American Law Schools and other entities within the American Bar Association show that very few schools are actually in compliance with this provision. Therefore, Mr. Palm will be drafting a strengthened Accreditation Standard and submitting it to the Illinois State Bar Association for its consideration to present as a state bar proposal to the Section of Legal Education. So Plaintiff remains quite active in the process of developing new standards and interpretations. The Department of Education has further confused the requirements of standing for members of an association. They fail to

understand that the association is made up of members and indeed it is only the members who must have standing in order to enable the Association to have standing. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services,* 120 S. Ct. 693 (2000) the Supreme Court restated its long-held rule that:

> "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right . . . ." at 704.

DOE acknowledges that the ABA through its officers would have standing but seems to suggest, although it is far from clear from their brief, that only the ABA's officers would have standing. But the Supreme Court recognizes that the ABA's members actually have the

standing and indeed their concerns are little different from those of the officers who are also ABA members: governance, liability and sound accreditation practices. In *Friends of the Earth*, recreational, aesthetic and economic interests were sufficient to show standing to seek damages for illegal pollution discharges. Nor did the members' statements that they would use the North Tyger River for recreation if the pollution was stopped, equate with the speculative "some day" intention alluded to by DOE.

The *Friends of the* Earth's members' intentions were sufficient and so are Plaintiff's intentions to use the accreditation process to

improve American legal education in the ways be believes appropriate. After thirty (30) years as a leader in clinical education, he intends to continue working toward fulfillment of the innovative, educational reforms he helped initiate. Sadly, the poor still lack legal services. Lawyering skills, professionalism and ethics are not taken seriously by most law school faculty members with low academic credit, exclusion of many students because of high over- subscription for the course offerings, just as examples. Legal Aid Clinics are still small and under-funded, yet clinical education is required for all medical students at the same universities that turn

away large numbers of law students from clinic programs. Certainly, much needs to be done and will only be accomplished through outside application of educational standards designed to prepare students for the practice of law. The research oriented faculty are too entrenched and, by and large, younger faculty are too driven seeking tenure, to bring about change from within.

If DOE believes that the current leadership of the American Bar Association should be joined to more fully present their views, then DOE can seek to have them joined. Just this week, Plaintiff spoke with Mr. David Roll, the attorney who represented the American Bar Association in the modification of the Consent Decree proceeding who stated that the American Bar Association has

no intention of seeking to intervene in this case on its own motion at this time.

It seems that the Department of Education does not want concerns of other members of the ABA to be raised. All they wanted to do was deal with the leadership, which as anyone who has ever dealt with the ABA knows, changes frequently with term limits and frequent elections. Therefore, those in the dissent or minority often end up in the majority. Plaintiff has been on both sides in the ABA generally and in the Council and Accreditation Committee at various times. Indeed he served out the term limits on the Council and the Accreditation Committee. He was nominated by the Section's Nominating Committee for both terms on the Council and ran unopposed. His election to both terms occurred without any negative votes.

The three-part test for standing is met. There is injury in fact, actual and imminent, since the DOE and ABA have already changed the governance structure to the disadvantage of those who seek to improve the accreditation system and are not part of the "guild" that DOJ found had captured the governance of the accreditation system. All ABA members have been and are affected because the ABA is and will be liable for attorneys fees and damages from tortious acts, contractual agreements and anti-trust violations committed by the Council and Legal Education Section as a new "separate and independent" entity but without governance control by the normal procedures of the House of Delegates, Board of Governors and ABA officers.

A case which is on point and was overlooked by DOE is *Department of Commerce v. United States House of Representatives*, 525 U.S.

316 (1999), which was an attack upon the sampling process proposed by the Census Bureau. The challenge was raised by voters in Indiana that the proposed sampling violated the Constitutions' requirement of an actual enumeration. In finding standing, the Court stated, "In the context of apportionment, we have held that voters have standing to challenge an apportionment statute because 'they are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes.'" At 331. *Baker v. Carr*, 369 U.S. 186, 208 (1962). The Court then proceeded to find that one fewer representative in Indiana would dilute the voting strength of Indiana residents and this was sufficient to create a "concrete", "actual" or "imminent" and not conjectural or hypothetical effect that was sufficient for standing. Likewise in this case, the change made by the Department of Education has substantially diluted the voting

strength of Plaintiff as a member of the ABA and a member of the Illinois State Bar Association which has several members of the House of Delegates and has generated proposals to reform the accreditation process. DOE's action significantly alters the relationship and value of the votes of dues-paying ABA members.

The Government's reliance on *Bender v. Williamsport Area School District*, 475 U.S. 534, (1986) is wholly misplaced. That was an action brought by a group of students seeking permission to conduct club activities of a spiritual nature. The Supreme Court concluded that because the school board official was sued in his official capacity and not in his individual capacity, he had no standing as an individual to take the appeal after a ruling in favor of the plaintiffs. The Court's opinion is quite simply that official capacity suits do not give rise to rights by the

losing official capacity officer to proceed in his individual capacity. That right is reserved to the official position, there, the school board. Here, plaintiff is suing as an individual and is not suing in any official capacity. Nor can he since he is not a government official. Furthermore, he has not claimed to be suing on behalf of the ABA or the Council or the Legal Education Section.

B. – Under Illinois law, this is the type of proceeding that Not-for-Profit corporation members have standing to bring and therefore should be accorded Article III standing.

In *Vermont Agency of Natural Resources v. United States, ex rel., Stevens*, 529 U.S. 765 (2000), Justice Scalia looked to whether the type of action brought is like "cases and controversies of the sort traditionally amenable to and resolved by the judicial process." There the False Claims Act was analogized to qui tam proceedings at common law. Likewise, Illinois has long recognized the right of members of Not-for-Profit Corporations to sue to

enforce the Corporations' constitutional provisions and the State Not-for-Profit Corporation Act. In essence, DOE has adopted regulations which force the ABA to violate the governance provisions of Illinois law. Plaintiff's action is analogous to a member's action available to him under Illinois law except Plaintiff is seeking to establish that DOE's requirement that the ABA create a "separate and independent" entity is contrary to federal law. Plaintiff's recognized standing under Illinois law is sufficiently similar to his federal action to confer standing to preserve his voting rights, and avoid exposure of the ABA to liability from wrongful conduct by those in control of the Council and the Legal Education Section over whom the ABA has no control.

Illinois cases uniformly hold that members of a not-for-profit corporation have standing to bring actions to enforce the Not-for-Profit

Corporation Act in the nature of ultra vires actions and standing to bring common law ultra vires actions. In *Sawko v. Dominion Plaza One Condominium Association No. 1-A*, 161 Ill.App.3d 521, 578 N.E.2d 621 (2d Dist. 1991) a member of a condominium association incorporated as a not-for-profit corporation sued under Section 103.15 of the General Not-for-Profit Corporation Act of 1986 (Ill. Rev. Stat. 1989, Ch. 32, par. 103.15) which allows proceedings in the state court against ultra vires actions of not-for-profit corporations as well as the traditionally-recognized actions at Illinois common law or equity to stop ultra vires actions. At 624. Plaintiff was challenging the assessments being charged to unit owners in the condominium association for road association assessments. The Court found standing and justiciability even though the Plaintiff had not asserted that he is one of the persons who are

being disproportionately assessed for the road association's legal fees. It was sufficient that his allegations showed injury to the Plaintiff in the general weakening of the condominium association common fund because that weakening affects all unit owners including the Plaintiff. This case is a specific direct holding that members of not-for-profit corporations can enforce the bylaws of the corporation through actions in Circuit Court and have standing for justifiable claims.

Cases along the same line are *Hines v. Turley*, 246 Ill.App.3d, 405, 615 N.E.2d 1251 (2d Dist. 1993). The Court states that "active members" would have standing to invoke the Not-for-Profit Corporation Act provisions but that the Plaintiffs were not "active" members. *Norris v. South Shore*

Chamber of Commerce, 98 Ill.App.3d 32, 424 N.E.2d 76 (1st Dist. 1981). (The Court recognized a contract action to enforce the bylaws with respect to election procedures of a not-for-profit corporation.) In *Adams v. Meyers*, 250 Ill.App.3d 477, 620 N.E.2d 1298 (1st Dist. 1993), not-for-profit corporation members given standing to challenge the conduct of not-for-profit corporation elections as violating the declaration, statutory authority and bylaws. Plaintiffs were challenging election procedures which nevertheless resulted in the election of the two plaintiffs. Plaintiffs were concerned about the application of the challenged

election procedures in the future and the Court went on to resolve the issue. This case shows the uniformity in Illinois cases granting standing to challenges that affect the voting strength of not-for-profit corporation members.

DOE's reliance in *Diamond v. Charles*, 476 U.S. 54 (1986) is unfounded. A pediatrician sought to intervene in the case filed by a group of physicians who provide abortion services and challenged the constitutionality of the Illinois Abortion Law of 1975. The physicians won and the abortion law was declared unconstitutional and affirmed on appeal. Then the pediatrician who had been given leave to intervene by the district court sought review in the United States Supreme Court. The Supreme Court ruled that the pediatrician lacked standing. The Court

reassured that the pediatrician's claim for standing would amount to having a right to compel the state to enforce the abortion law had it been held constitutional. But the Supreme Court previously had ruled that private persons lack a judicially cognizable interest in the prosecution or non-prosecution of another, relying on *Linda R. S. v. Richard D*, 410 U.S. 614 (1973).

Here Plaintiff is not seeking criminal enforcement of the law against anyone. In passing, Justice Blackman noted though, "The Illinois legislature, of course, has the power to create new interests, the invasion of which may confer standing. In such a case, the requirements of Article 3 may be met." Note 17. Indeed, Illinois has created rights to take action to avoid ultra vires behavior and other conduct in violation of the Illinois Not-for-Profit Corporation Act. In short, the pediatrician had no protectible interests

because he was not directly affected by the abortion act provisions. Here, as a member of the ABA and a member of other bar organizations, Plaintiff has the requisite personal interests.

IV. PLAINTIFF HAS STANDING BECAUSE HE IS RELYING ON ABA ACCREDITATION STANDARDS IN HIS CASE SEEKING TO OBTAIN A "FOR CAUSE" DETERMINATION FOR THE RENEWAL OF HIS CONTRACT AS A PROFESSOR AT THE UNVERSITY OF CHICAGO LAW SCHOOL.

Plaintiff has brought an action in the Circuit Court of Cook County for a Declaratory Judgment that he is entitled to a "for cause" consideration in the refusal of the University of Chicago Law School to renew his appointment as Clinical Professor of Law after thirty (30) years. Plaintiff was Director of the Schools' Clinic for twenty-one (21) years and continued as a Clinical Professor thereafter. The University takes the position that, at the end of his last four (4) year

contract in June 2000, he was an "at will" employee who could be renewed or not for any reason or no reason. Furthermore, the very provisions in Accreditation Standard 405(c) requiring that clinical faculty members have a form of security of position reasonably similar to tenure has been under review by the Section and its Council for modification to eliminate some of the provisions he relies upon. So far CLEA and others have successfully mounted a strong reaction and developed fully the arguments opposed to these retrenching changes.

Those moves to cut back on 405(c) were made by the academics and deans right after the elimination of the House of Delegates as the final decision making body. There is a fair likelihood that within the next several years, the advances made in bringing equality to clinical teachers and seeking equality for legal writing teachers so that

we can develop better teaching and learning in these relatively new areas of law schools will be cut back. All these show that Mr. Palm is suffering a specific injury.

V. FOR STANDING, PLAINTIFF DOES NOT NEED TO SHOW THAT HE WILL BE SUCCESSFUL IN RETURNING THE HOUSE OF DELEGATES TO ITS FINAL DECISION MAKING ROLE BUT IT IS SUFFICIENT THAT HE AND OTHERS IN THE ABA HAVE THE OPPORTUNITY TO TRY.

The Supreme Court has made clear in two recent decisions that elimination of a bargaining chip is sufficient to establish standing. *Northeastern Florida Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656 (1993) and the second Line Item Veto case, *Clinton v. City of New York*, 524 U.S. 417 (1998). In *Northeastern Florida*, the Court ruled that non-minority contractors had standing to challenge a minority business set aside statute because, even

though they did not show that they would have obtained a contract had they been allowed to compete, the mere allegation that they were not allowed to compete for a state contract was sufficient. Standing was found because the members of the contractors' association could not bid on contracts set aside for minorities. The Court followed *Regents v. Bakke*, 438 U.S. 265 (1978) and held that it was sufficient for standing that plaintiff allege that he was denied the opportunity to compete for a position and the Court stated "When the Government erects a barrier that it makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." At 666.

In *Clinton*, the Snake River Farmers Cooperative was involved in negotiating to acquire processing plants that would have benefited from a tax break that President Clinton had vetoed with the second Line Item Veto case. The Snake River Farmers would have relied on the tax break as a bargaining chip in their negotiations. As the Court stated, "the Government argues that there can be an Article Three injury only if Snake River would have actually obtained a facility on favorable terms. We have held however that the denial of a benefit in the bargaining process can itself create an Article Three injury, irrespective of the end result." Citing *Northeastern Florida.*

Here, as a member of the Illinois State Bar Association and a member of the American Bar Association, Plaintiff has lost a major bargaining chip in obtaining improvements and changes in accountability in accreditation processes and

activities. As discussed above and as will be shown with particularity by affidavits or evidence at trial, improvements in the accreditation standards and processes have been made as a result of threats to make a floor fight in the House of Delegates and were obtained through compromises to avoid that eventuality. Plaintiff does not need to show that a change will result in every instance.

Indeed, even though there is no certainty that the ABA will actually go back to its prior arrangement in which the House of Delegates was the final decision maker on accreditation matters and control the budget and other administrative activities of the Legal Education Section, this possibility is still a bargaining chip if the Council does not act in ways satisfactory to state bars, House of Delegates' members. Whether or not this is a good result is not the issue. The question is whether it is an actual, realistic bargaining chip,

which is not available as long as DOE's illegal requirements are imposed on the ABA.

VI. IT IS AN ABUSE OF DISCRETION FOR DOE TO REQUIRE THE ABA AND ITS MEMBERS TO ABANDON DOE ACCREDITATION STATUS RATHER THAN CHALLENGE THE LEGALITY OF DOE'S REGULATIONS.

The question is whether the Department of Education has violated the Higher Education Act and has taken away the powers of the House of Delegates illegally and unfairly. Plaintiff is not seeking any monetary relief. Rather, as the Court said in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.* 528 U.S. 167, 185-186 (2000) "It can scarcely be doubted that, for a Plaintiff who is injured or faces the threat of future injury due to illegal conduct on-going at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress."

The Department of Justice has also argued that the ABA could just walk away from its accrediting authority to accredit independent law schools. But this is really a grossly unfair and improper position for the United States Government to take. Rather than challenge the legality of the United States Government's actions, which are really just the actions of Government employees, Americans are told to give up their underlying right. This has never been an acceptable position. Rather, accountability is more justified. If anything, it shows the need for review by the courts to bring the rule of law back to DOE. To make it clear, Plaintiff's first preference is that the ABA remain the DOE approved accrediting body for the independent law schools. If Plaintiff loses this case, he may well seek other options including having the ABA abandoning its role as a DOE approved

accrediting agency. But this should not be the only recourse that is available to eliminate the effect of unlawful behavior by federal employees.

The other problem with the Department of Education position is that it has way overreached its authority by requiring that all ABA accreditation activities, even its accrediting of the over 160 University-related law schools for permission for its graduates to sit for the bar in the 50 states, must be in compliance with the "separate and independent" requirement or the ABA will lose its DOE recognition. This attempt to control the governance process for the 160 non-independent law schools is way beyond the authority of the Department of Education as set out in the statute. Besides that, it is a gross abuse of discretion and power by Department of Education to seek to control the governance of other processes than their limited interest. When

queried, DOE employees' only justification has been that it would be inefficient to have the 20 independent law schools be reviewed under two different governing structures. But the 160 University related law schools are subjected to two accreditation reviews already under DOE regulations. The only legitimate concern of the Department of Education is the supervision of the accreditation of the less than 20 independent law schools to obtain federal financing and federal grants and loans for the students at those few schools.

Respectfully submitted,

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